

Supreme Court, U. S.

FILED

MAY 20 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

76-1619

CRUTCHER-ROLFS-CUMMINGS, INC.

Petitioner

v.

SAM L. BALLARD

Respondent

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

CRUTCHER-ROLFS-CUMMINGS, INC.

Petitioner

v.

SAM L. BALLARD

*Respondent***PETITION FOR WRIT OF CERTIORARI***To the Honorable Supreme Court of The United States:*

Petitioner Crutcher-Rolfs-Cummings, Inc. respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Court of Civil Appeals of the State of Texas, Thirteenth Judicial District (Corpus Christi), filed June 30, 1976. The opinion of the Texas Court of Civil Appeals is reproduced as Appendix A to this Petition and is reported at 540 S.W.2d 380. The Application for Writ of Error to the Supreme Court of Texas was refused on January 5, 1977 (Appx. R,S, 20 Tex.Sup.Ct.J. 124)

Opinion Below and Jurisdiction

The judgment (Appx. O) and opinion (Appx. A) of the Texas Court of Civil Appeals were filed on June 30, 1976,

and Petitioner's Motion for Rehearing was denied on August 30, 1976 (Appx. P). A timely-filed Application for Writ of Error to the Supreme Court of Texas (Appx. R) was refused on January 5, 1977 (Appx. S) and Petitioner's Motion for Rehearing (Appx. T) was overruled on February 23, 1977 (Appx. U). This Petition for Writ of Certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) on the ground that the trade secret law of the State of Texas dealing with patented inventions is repugnant to the Constitution and patent laws of the United States.

Questions Presented

1. Is a state cause of action based on a trade secret preempted by federal patent law when the alleged breach of confidence does not occur until *after* the secrecy of the invention is destroyed by issuance and publication of a United States patent covering the formerly secret invention?

2. May a state ignore the federal law of patent infringement in determining the scope or coverage of a United States patent in a state court action?

Constitutional Provisions

U.S. CONST., art. I, § 8, cl. 8

The Congress shall have power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

U.S. CONST., art. VI, cl. 2

The Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States; shall be the supreme

Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statute

35 U.S.C. § 112

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

. . .

Statement of the Case

This suit was brought by Sam L. Ballard against Crutcher-Rolfs-Cummings, Inc. based on theories of breach of a patent license agreement and breach of a confidential relationship for failure to pay royalties on pipe bending machines made according to the Ballard patented invention (Appx. B). The jury found that Petitioner breached the patent license agreement and a confidential relationship, and awarded Ballard actual damages of \$674,873.02 and punitive damages of \$650,000.00 for a total of \$1,324,873.02 (Appx. A). The trial court entered judgment (Appx. J) based on the jury's findings and Petitioner appealed to the Texas Court of Civil Appeals sitting at Corpus Christi (Appx. M).

The Court of Civil Appeals found the jury's findings with regard to the breach of contract and confidential relationship insufficient to support the judgment under Texas law, but affirmed the judgment of the trial court based solely on its holding that there existed a confidential relationship as a matter of law between Petitioner and Ballard because of the disclosure of a secret invention (Appx. A).

Petitioner's Motion for Rehearing to the Court of Civil Appeals was denied on August 30, 1976 (Appx. P); its Application for Writ of Error to the Supreme Court of Texas (Appx. R) was refused on January 5, 1977 (Appx. S); and its Motion for Rehearing to the Supreme Court of Texas (Appx. T) was overruled on February 23, 1977 (Appx. U).

The pertinent facts which are essential to resolution of the issues raised by Petitioner are undisputed. Ballard disclosed his invention to Petitioner in November, 1949 and a letter-agreement (Appx. C) was signed by the parties. A more formal patent license (Appx. D) based on the same invention was signed in 1954. Ballard elected to protect his invention by a United States patent and accordingly filed an application in the United States Patent Office on March 27, 1950. The Ballard patent (No. 2,708,471; Appx. B) was issued on May 17, 1955 thereby disclosing and publishing the formerly secret invention. Petitioner manufactured and sold pipe bending machines according to the Ballard patent continuously from the early 1950's through the mid-1960's at which time the Ballard invention proved commercially unsuccessful when compared to pipe bending machines made by a competitor (Crose) according to another design invented by Charles Coody and patented in 1956. By 1966 successful exploitation of the Ballard invention was no longer feasible (Appx. E) and Petitioner purchased a corporation (Crose) which was licensed to build and sell machines covered by the Coody patent. Thereafter, Petitioner, through the corporation it acquired, manufactured

and sold the Coody patented machine and paid patent royalties to the successors of the Coody patent rights. Ballard filed suit in 1968 and claimed that Petitioner owed him royalties on the revenues derived by Crose (the acquired corporation) on the machines made according to the Coody patent. Ballard was awarded a judgment for the breach of a confidential relationship based on a *secret* invention, even though the secret invention was *published* in his issued United States patent (Appx. B) more than eleven years prior to the date the alleged breach first occurred in 1966.

The errors of the trial court were preserved in Petitioner's objections to the court's charge, Motion for New Trial, Motion for Judgment Non Obstante Verdicto, and Brief on Appeal of the Court of Civil Appeals. Those errors were further preserved, and additional errors of the Court of Civil Appeals were preserved, in Petitioner's Motion for Rehearing to the Court of Civil Appeals, Application for Writ of Error to the Supreme Court of Texas, and Motion for Rehearing to the Supreme Court of Texas. The pertinent portions of the aforesaid documents in which Petitioner has preserved the error which Petitioner has raised before this Court are appended to this Petition in a separately bound volume for the Court's convenience.

Reasons for allowing the Writ

I. State trade secret law covering the use of patentable inventions is preempted by federal patent law when an inventor elects to protect his invention by securing a United States patent, assuming there has been no breach of confidence before publication of the secret invention in an issued patent.

Federal preemption of state trade secret law by federal patent law has been considered recently by this Court in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). In *Kewanee*, the Court concluded that state trade secret law is not preempted in the case of an invention which is kept secret, albeit patentable, but which is not patented.

The *Kewanee* decision does not answer the questions raised by Petitioner because it dealt with an unpatented invention whereas here we are dealing with a patented invention. However, *Kewanee* nevertheless sets out appropriate guidelines for analyzing this case. Under the test adopted in *Kewanee*, state law is void under the Supremacy Clause (U.S. CONST. art. VI, cl. 2) when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 416 U.S. at 479.

The Constitutional provision on which our patent statutes are founded states the objectives to be "to promote the Progress of Science and the useful Arts." U.S. CONST. art. I, § 8, cl. 8. The method for promoting the progress of science embodied in the patent statute was best stated by this Court in *Universal Oil Products Co. v. Globe Oil & Refining Co.*, 322 U.S. 471, 484 (1944) in which the Court said:

As a reward for inventions and to encourage their disclosure, the United States offers a seventeen-year monopoly to an inventor *who refrains from keeping his invention a trade secret*. But the *quid pro quo* is disclosure of a process or device in sufficient detail to enable one skilled in the art to practice the invention once the period of the monopoly has expired; and the same precision of disclosure is likewise essential to warn the industry concerned of the precise scope of the monopoly asserted. (emphasis supplied).

Thus, once the inventor elects to patent his invention he is obliged to fully disclose it when his patent issues and thereafter rely solely on his patent to protect his previously secret invention. As Judge Learned Hand held in *Conmar Prod. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 156 (2d. Cir. 1949), "Thus, any possible [trade secret] liability for exploiting whatever the patents in suit disclosed, ended with their issue."

The Supreme Court of Pennsylvania recently considered this issue in *Felmlee v. Lockett*, 351 A.2d 273 (Pa. 1976). In *Felmlee*, plaintiff brought suit against defendant for breach of a confidential relationship arising from plaintiff's disclosure to defendant of confidential design and chemical formulation for fishing lures. Plaintiff sought and obtained a U.S. patent for the design of his lure but not for the chemical formulation. In recognition of the distinction between an invention which is patented and one which is maintained in secrecy, the Pennsylvania Supreme Court held that plaintiff was entitled to recover against defendant for its wrongful use or disclosure of the secret chemical formulation, but that no legally protectable trade secret could exist as to the design which was patented. The court said:

35 U.S.C. § 112 provides that: "The specification [required to be appended to a patent application] shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same . . ." *The result of this section and the very nature of the patent publication have been consistently held to work a destruction of any trade secret disclosed therein*. We are thus precluded from awarding the appellees equitable relief on this point. (citing cases) 351 A.2d at 278 (emphasis supplied).

Reference is made to the volume of authority cited by the *Felmlee* court (351 A.2d at 278, n.5) supporting this position. The basis for the *Felmlee* holding, and the position urged by Petitioner, is that an inventor must elect to protect his invention either as a trade secret or under the U.S. patent laws, but that election to pursue patent protection and the public disclosure of the invention by issuance of the patent extinguishes trade secret protection. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933), R. MILGRIM, *TRADE SECRETS*, §8.02[1], [2] (1976).

Under Texas trade secret law, one who learns a trade secret from its owner is obligated not to use and not to disclose the secret to others without the owner's permission. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958). In this case, Petitioner is not accused of breaching any confidence based on the use or disclosure of the secret invention *before publication* of the invention in an issued patent. The disclosure of the allegedly secret invention to Petitioner by Ballard occurred in 1949, the formerly secret invention was published when Ballard's patent issued in 1955, and Ballard's cause of action against Petitioner is for a breach of confidence which first occurred in 1966 (Special Issue 3, Appx. J-3), some eleven years after the formerly secret invention was disclosed in his patent. Thus, Texas trade secret law as applied in this case to a *patented* invention would obligate Petitioner to not use or disclose the Ballard invention to others, even after a patent on the invention issued. Therefore, Texas trade secret law is a direct obstacle to and frustrates the primary objective of federal patent law, that of full and complete disclosure of the invention in the patent, and this state law is preempted pursuant to the *Kewanee* test. Having elected to protect his invention by a patent and thereby publicly disclosing it, the inventor waives any claim to trade secret protection after the issuance of his patent.

In *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), a portion of state contract law (licensee-estoppel) fell because it frustrated the purposes and objectives of the federal patent laws. In this case, a portion of state trade secret law (protection of a once secret invention after it has been disclosed in an issued patent) must necessarily fall for the same reason. See Stern, *A Reexamination of Preemption of State Trade Secret Law After Kewanee*, 42 Geo. Wash. L. Rev. 927 (1974).

II. State trade secret law which extends the scope of protection for a patented invention beyond that granted by the patent is preempted by federal patent law.

Ballard sought royalties from Petitioner beginning in 1966 on machines which were made according to the Coody patent by a corporation (Croze) acquired by Petitioner in 1966. At the trial Petitioner took the position that Petitioner was not obligated to pay Ballard a royalty on any machine which was not within the scope of his (Ballard's) patent. Special Issue No. 1 as submitted to the jury alludes to the Croze machines and certain of the claims of the Ballard patent, but was fatally defective in that it did not comply with the well established tests of patent infringement in many respects. For example, Ballard attempted to expand the scope of his patent to include machines made according to the Coody design which were manufactured by Petitioner. Petitioner raised the common defense known as "file wrapper estoppel" which prevents a patent owner from taking a position at trial in order to find infringement which is contrary to the position which he urged before the Patent Office in order to induce the grant of the patent. The trial court refused to allow Petitioner to submit an issue to the jury on this defense (Appx. H) thereby improperly charging the jury with respect to the issue of patent infringement.¹ The Court of Civil Appeals refused to review the failure of the trial court to properly submit the patent infringement issue and said

¹ Also, Petitioner urged before the Court of Civil Appeals that the infringement issue was defective because it (1) required a comparison of the machines made according to the Ballard patent with the accused machines, rather than a comparison of the claims of the Ballard patent with the accused machines, and (2) asked the jury if the accused machines were "substantially in accordance with" the machines covered by the claims of the Ballard patent, rather than asking the jury to find that the accused machines were within the scope of the patent claims.

The technicalities of federal patent laws are not determinable of Ballard's rights under the subject contract and confidential relationship. (Appx. A-16)

This holding by the Court of Civil Appeals effectively broadened Ballard's rights in his invention beyond the scope of his rights under his United States patent. Action such as this is foreclosed to the states since the law relating to patented inventions has been preempted by the federal patent statutes.

This Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), recently considered an attempt by a state court to prevent copying of a pole lamp on which the patent was invalid. In concluding that the states' power to prohibit copying of the pole lamp was preempted this Court said:

When state law touches upon the area of these federal statutes, it is "familiar doctrine" that the federal policy "may not be set at naught, or its benefits denied" by the state law. [citation omitted] 376 U.S. at 229.

. . .

Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. . . . *Just as a State cannot encroach upon the federal patent laws directly, it cannot under some other law such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent law.* 376 U.S. at 231 (emphasis supplied).

Likewise, in a companion case, this Court in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), held that state unfair competition law which gives relief against the copying of unpatented industrial designs was preempted by federal law.

Subsequent to *Sears and Compco*, this Court in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), found that the enforceability of a contract, otherwise valid under state law, was preempted to the extent that it required the payment of royalties beyond the expiration of the licensed patents.

Similarly, in *Lear v. Adkins, Inc.*, 395 U.S. 653 (1969), a patent license obligated the licensee not to contest the validity of the patent, a familiar provision enforceable under California law as well as that of other states. This Court held that "... federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent" and found the provision of the contract dealing with licensee estoppel to be preempted. 395 U.S. at 668.

Thus, *Sears, Compco, Brulotte* and *Lear* require that a state afford protection for an invention only to an extent consistent with the proper scope of a valid United States patent. The proper scope of a patent is determined by the rules governing the determination of infringement of the patent, and any part of the invention not covered by the patent is dedicated to the public upon issuance of the patent. It is the claims of the patent which measure the scope of the patented invention, and the rules of patent infringement determine whether or not any of the claims cover the accused device. *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917). It has been uniformly held by courts in states other than Texas that a device is within the scope of a patent only if that patent has been infringed as the doctrine of infringement has evolved in the federal courts. *H. M. Chase Corp. v. Idaho Potato Processors, Inc.*, 529 P.2d 1270 (Idaho 1974); *American Photocopy Equipment Co. v. Ampto, Inc.*, 198 A.2d 469 (N.J. Super Ct. App. Div. 1964); *Adkins v. Lear, Inc.*, 435 P.2d 321, (Calif. 1967), *rev'd on other grounds*,

395 U.S. 653 (1969); *Perbal v. Dazor Manufacturing Corp.*, 436 S.W.2d 677 (Mo. 1968). As stated in *American Photocopy*,

It is settled that the test of whether machines sold by a patent licensee come within the coverage of the patent, for purpose of a suit for royalties, is the same as that employed in a patent infringement suit. 198 A.2d at 475.

The failure of the Texas courts to find patent infringement by applying "the technicalities of federal patent law" effectively broadens the protection given the Ballard invention by his patent and thereby conflicts with purposes and objectives of the federal patent laws.

Conclusion and Prayer

The issues raised by the Petition are of national economic importance and merit consideration and resolution by this Court for the same reasons that this Court granted the petitions in *Sears*, *Compco*, *Lear* and *Kewanee*. The only critical issue left unresolved by these cases, state treatment of *patented* inventions, is the issue presented by this Petition. Unless this Court determines the balance between state trade secret law and federal patent law once and for all, *patented* inventions will receive a varying scope of protection in different states depending on state trade secret law. This situation frustrates and is contrary to the purposes and objectives of federal law dealing with patented inventions. It is respectfully submitted that this Petition should be granted for these reasons.

WHEREFORE, premises, argument and authorities considered, Petitioner prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PETITION FOR WRIT OF CERTIORARI has been served on plaintiff-respondent by delivering three copies to his attorney of record, Jack W. Hayden, Suite 1270 Park Tower South, 1333 West Loop South, Houston, Texas 77027, this 20th day of May, 1977.

A. A. Evans

MAY 20 1977

MICHAEL RODAN, JR., CLERK

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No. **76-1619**

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Petitioner

v.

SAM L. BALLARD

Respondent

APPENDIX TO
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APPENDIX A

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No. 1059

IN THE

Court of Civil Appeals

FOR THE

THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

CRUTCHER-ROLFS-CUMMINGS, INC.,

Appellant

v.

SAM L. BALLARD,

Appellee

ON APPEAL FROM THE 80TH DISTRICT COURT OF

HARRIS COUNTY, TEXAS

OPINION

Sam L. Ballard brought this suit against Crutcher-Rolfs-Cummings, Inc., to recover for breach of a patent license agreement and for breach of a confidential relationship. Trial was to a jury who answered the issues in favor of Ballard. Judgment was entered that Ballard recover actual damages of \$674,873.02 and punitive damages of \$650,000.00 for a total of \$1,324,873.02. The defendant corporation (hereinafter called "CRC") appeals.

The appellant is a Texas corporation founded in 1933 for the purpose of manufacturing, selling and renting pipeline equipment. In 1949 Ballard approached the president of the appellant corporation, Mr. A. S. Crutcher, to solicit his assistance in developing a cold pipe vertical bending machine. Ballard demonstrated to Mr. Crutcher and several corporate officers a scale model of his machine. The president was favorably impressed and Ballard was imme-

diately placed on the corporation's payroll. The parties agreed that Ballard would utilize the corporation's shop facilities in building a cold pipe vertical bending machine of his design capable of bending 30" pipe. The corporation agreed to pay all the expenses incidental to securing a patent. A royalty of 5% was agreed upon. A letter reflecting the terms of their agreement was drawn and signed on November 8, 1949, by Ballard and A. S. Crutcher.

In March, 1950, Ballard filed in the United States Patent Office a patent application for a vertical pipe bending machine operated by cables. On November 3, 1950, the United States Patent Office declared an interference to determine priority of inventorship between the application filed by Ballard and one filed June 14, 1948, by John L. Coody. Ballard contended before the Board of Patent Interferences that he conceived and reduced to practice the invention prior to Coody, and that Coody derived the invention from him.

The invention was born from the need which arose in the pipeline industry for a portable machine for field use which would perform smooth cold bending of large diameter steel pipes of the type used in cross country oil and gas pipelines. Such pipes are generally within the range of 12 to 36 inches in diameter and bend specifications require that the bends be full, round, smooth and wrinkle free.

The Ballard machine is operated by a single cable for bending pipe in a vertical plane. A frame is provided which is movable along the right of way of the pipeline and it carries a fixed mounted, downwardly facing, bending die near the upper portion. The die is shaped to receive the upper semi-periphery of the pipe to be bent and is longitudinally curved to the bend desired in the pipe. Below and at one end of the die is a holding shoe which is employed for engaging the underside of the pipe and preventing downward movement during the bending operation. The

bending is accomplished by the use of a single cable which is drawn by a winch through a series of pulleys.

In contrast to the Ballard machine which bends the pipe vertically, Coody's machine bends it horizontally utilizing hydraulic force applying means. Both, however, use multiple force applying means and the same essential elements: a fixed curved bending die, a movable holding shoe, and a movable stiff straight bending shoe having a part overlapping the die.

Cinch, Inc. was the owner of the license to the Coody patent application and was actively competing against the appellant in the pipe bending machine market. By decision of the Board of Patent Interferences, Ballard was awarded priority of the invention and Cinch filed suit to set aside this decision. This litigation was ultimately settled by agreement in 1954 in which Ballard and CRC agreed not to sue Cinch for infringement of any patent claims by reason of the manufacture, use, sale or rental of hydraulically-operated pipe bending machines and Cinch agreed not to sue CRC for infringement of any patent claims by reason of the manufacture, use, sale or rental of cable-operated pipe bending machines.

On December 6, 1954, Ballard and the appellant reconfirmed their license agreement by executing a second written instrument. By its terms Ballard granted to the appellant the exclusive, indivisible right and license to manufacture, have manufactured, use and sell the apparatus embodying the inventions as disclosed by Ballard's patent and patent applications and any and all modifications and improvements that Ballard then owned or controlled or might own or control during the term of their agreement. The appellant agreed to pay a royalty of 5% of the net selling price and of the rental receipts of the pipe bending machines.

By 1965, the appellant's competitor, who was manufacturing the Coody hydraulically-operated pipe bending machine, was capturing the greater portion of the pipe bending machine market. In January 1966, the appellant purchased all of the issued and outstanding shares of its principal competitor, the CGM Corporation (successor to Cinch), and thereby acquired 82.04% of the outstanding shares of the Crose United Corporation.

In February 1966, Ernest E. Cummings, a director and vice president of CRC approached Ballard to persuade him to sign a letter of agreement to the effect that Ballard would not be entitled to a royalty on the hydraulically-operated bending machines manufactured, used or sold by CRC. Ballard was not persuaded and refused to sign the agreement.

In May 1966, the appellant transferred substantially all of the operating assets of CRC to Crose United Corporation. Also in May 1966, the name Crose United Corporation was changed to CRC-Crose-International, Inc., (hereinafter called "Crose"). The assets transferred by the appellant included hydraulically-operated bending machines, but did not include the cable bending machines. Thereafter, the appellant continued leasing and selling cable-operated bending machines and Crose continued leasing and selling hydraulically-operated bending machines and paying royalties therefor to the successors of the Coody patent rights.

The jury found, in part, that: 1) the pipe bending machines and bending sets manufactured, used, rented or sold by Crose were substantially in accordance with, or the equivalent of, the Ballard pipe bending machines; 2) a confidential relationship existed between Ballard and CRC from November 1949 through February 1966; 3) CRC breached the confidential relationship by failing to pay royalties on the net revenue resulting from the manufacture, use, sale and rental of pipe bending machines by

Crose 4) \$674,873.02 would compensate Ballard for the breach of confidence; 5) CRC failed to perform under the contract by transferring assets to Crose; 6) \$674,873.02 would compensate Ballard for the breach of contract; 7) the president of CRC knew or should have known of the failure to pay royalties; 8) Ballard should recover punitive damages of \$650,000.00.

We note at this point in our discussion that the appellant has assigned 68 points of error. Among these are numerous no evidence or legal sufficiency points of error. With each such point of error, we shall view the evidence in a light most favorable in support of the jury finding and consider only the evidence and inferences which support the finding and reject the evidence and inferences contrary to the findings. *Miller v. Riata Cadillac Company*, 517 S.W.2d 773 (Tex. Sup. 1975). In considering the appellant's insufficient evidence or factual sufficiency points of error, we shall examine the whole record to determine if the evidence supports the jury's findings. In *re King's Estate*, 244 S.W.2d 660 (Tex. Sup. 1951).

The appellant first contends in points of error 1 through 7 that the trial court erred in failing to submit issues inquiring as to the vicarious liability of appellant for the business activities of Crose. The argument is that special issues 3, 4 and 5 are worded such that the jury was required to assume that vicarious liability existed.

The special issues 3, 4 and 5 which were submitted to the jury and their answers thereto are as follows:

"SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that Crutcher-Rolfs-Cummings, Inc. breached the confidential relationship with Sam L. Ballard by failing to pay royalties on the net revenue resulting from the manufacture, use, sale and rental of the pipe bending

machines and bending sets of CRC-Croose International, Inc. between May 1966 and May 17, 1972?

Answer 'We do' or 'We do not'. Answer: *We do.*

If you have answer Special Issue Nos. 2 and 3 'we do', and only in that event, then answer:

SPECIAL ISSUE NO. 4

What amount of money, if any, do you find from a preponderance of the evidence will compensate Sam L. Ballard for the breach of the confidential relationship by Crutcher-Rolfs-Cummings, Inc. in failing to pay royalties on the pipe bending sets manufactured, used, rented and sold by CRC-Croose International, Inc. from May 1966 through May 17, 1972?

Answer in dollars and cents. Answer: \$674,873.02.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Crutcher-Rolfs-Cummings, Inc. failed to perform under the license agreement of December 6, 1954 by transferring in 1966 the manufacturing, using, renting and selling of vertical hydraulic pipe bending machines and bending sets to CRC-Croose International, Inc.?

Answer 'We do' or 'We do not'. Answer: *We do.*"

We cannot agree that these special issues assume vicarious liability. Ballard does not complain of the actions of Crose. The wrong complained of is the use of the device by the appellant without accounting to Ballard. The theory of recovery is a cause of action for breach of confidential relationship or wrongful use of a trade secret. The secret ideas for the device were disclosed in confidence prior to its being patented. The appellant transferred the production of the device to a subsidiary corporation that did in fact produce a similar device. In this manner, the appellant used the secret information of Ballard without accounting to him. That is, the appellant divested itself of

the means of production and yet continued to share in the benefits of production through ownership of the stock in Crose. Each alleged wrongful act was found by the jury to be committed by the appellant, not the subsidiary. It was not necessary, therefore, to establish vicarious liability in the present case. Appellant's points of error 1 through 7 are overruled.

The appellant next argues in points of error 8 through 20 that the trial court applied the wrong measure of damages in submitting special issues 4 and 6. It contends that special issues 4 and 6 require the jury to base the measure of damages upon the business done by Crose rather than the business that would have been done by the appellant. Appellant further contends that the damages are excessive and that the proper measure of damages, if any, would have been 5% of the revenue the appellant would have received had the appellant not purchased the stock of Crose United in 1966 and had not transferred certain business assets to Crose in 1966. It is also contended that there is no evidence or insufficient evidence to support the submission of or jury findings of special issues 4 and 6.

Special issue 6 was submitted as follows:

"SPECIAL ISSUE NO. 6

What amount of money, if any, do you find from a preponderance of the evidence will reasonably compensate Sam L. Ballard for the failure, if any, of Crutcher-Rolfs-Cummings, Inc. to perform under the license agreement of December 6, 1954?

Answer in dollars and cents. Answer: \$674,783.02."

We do not agree that special issues 4 and 6 require the jury to base the measure of damages upon the business done by Crose. On the contrary, we find an absence of instruction to the jury in special issues 4 and 6 as to the

proper measure of damages. The appellant submitted, separate and apart from his objection to the charge, a written instruction in the following form which was refused by the trial judge.

"The measure of damages is 5% of the revenue that defendant Crutcher-Rolfs-Cummings would have received if defendant Crutcher-Rolfs-Cummings had not purchased the stock of Crose United in 1966 and had not transferred certain of its business assets to CRC-Crose International in 1966. You are not to consider the amount of business done by CRC-Crose in determining the damages, if any, suffered by plaintiff Ballard. You may consider only the amount of business that would have been done by defendant Crutcher-Rolfs-Cummings but for the acts, if any, complained of by plaintiff Ballard.

Refused 11/14/1974
11/25/a.m.

/s/ MADISON RAYBURN
Judge 80th Dist. Crt. Texas"

It is the duty of the trial court to give the jury, in its charge, the rule to be applied in ascertaining the damages. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. Sup. 1973); *International-Great Northern R. Co. v. Casey*, 46 S.W.2d 669, 671 (Tex. Comm'n App. 1932, holding adopted). In the absence of a required instruction, the complaining party must, in accordance with Rule 279, T.R.C.P., submit an instruction which is in substance correct in order for the error to constitute a ground for reversal. *Yellow Cab and Baggage Company v. Green*, 277 S.W. 2d (Tex. Sup. 1955). The issue thus becomes whether or not the requested instruction offered by the appellant about the measure of damages was substantially correct in the form in which it was submitted and refused. We hold that

it was not. Ballard attempted to recover royalties that were not paid under the contract of December 6, 1954. By the terms of the contract the parties agreed that the licensee could manufacture, use, sell, or rent the device or have a third party perform these functions. It was also agreed that a 5% royalty would be paid upon the net selling price and rental receipts of the device. As we construe the contract, it is not significant who performs these functions or who receives the revenue from the customer. The royalty is due when the device is sold or rented by either the licensee or a third party whom the licensee has permitted to perform these functions. The jury found in special issue 1 that the machines produced by Crose were the equivalent of those covered in the Ballard license agreement. A corporation that contracts to pay royalties upon the sale or rental of certain products cannot avoid liability for failure to pay those royalties where, as here, the assets for the production of those products are transferred to a subsidiary corporation that does in fact produce, sell and rent a substantially equivalent product. We find that the record will support this theory of recovery and will, therefore, support the submission of and the jury's answer to special issues 4 and 6.

Attacking special issues 5 and 6 the appellant contends in point of error 38 through 46 that there is no evidence that CRC failed to perform under the license agreement of December 6, 1954, by transferring in 1966 the manufacturing, using, renting and selling of vertical hydraulic pipe bending machines and bending sets to Crose. We must agree with the appellant that by the terms of the contract of December 6, 1954, a transfer of these functions does not constitute a failure to perform under the agreement. In fact, the license agreement expressly provides that the licensee has the right not only to manufacture the appa-

tus, but also has the right to have it manufactured. A breach does not occur until a party to an agreement fails to perform an act or thing that he has expressly or impliedly promised to do. *Foster v. Wagner*, 343 S.W.2d 914, 917 (Tex. Civ. App. — El Paso 1961, writ ref'd n.r.e.). We cannot say that the appellant expressly or impliedly promised not to transfer the production, sale, use or rental of the device. It is the failure to pay the royalties that constitutes a breach of the agreement; not the transfer of the production and marketing to the subsidiary. We hold, therefore, that there is no evidence to support the submission of or jury answer to special issue 5. This will not, however, preclude affirmance of the judgment. The judgment may be affirmed on the jury's answers to other special issues and thus the error in submitting special issue 5 is harmless. *City of Lubbock v. Onley*, 498 S.W.2d 429 (Tex. Civ. App. — Amarillo 1973, writ ref'd n.r.e.); Rule 434, T.R.C.P.

The additional theory of recovery asserted in the trial court was a breach of confidential relationship. The issues submitted to the jury on this theory were special issues 2 and 3. We have previously set out special issue 3. Special issue 2 was submitted as follows:

"SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that a confidential relationship existed between Sam L. Ballard and Crutcher-Rolfs-Cummings, Inc. from November 1949 through February 1966?

You are instructed that by the term 'confidential relationship' as used in the above issue is meant every form of relationship between parties wherein confidence and special trust is reposed by one in another and he is justified in placing such trust and confidence in such other party and relies upon such other party to protect his interest. This relationship is based upon fair dealing and good faith, rather than legal obligation. The

term includes informal relationships, such as moral, social, domestic or merely personal ones, where one person trusts in and relies upon another.

Answer 'We do' or 'We do not'. Answer: *We do.*"

The appellant contends in points 21 through 37 that the necessary implication of the jury's response to special issue 2 is that the confidential relationship existed only through February 1966, and thus did not exist at the time of the alleged breach, May 1966. We do not agree. Although there is an absence of a jury finding that a confidential relationship existed at the time at which the jury found the breach to have first occurred, we find that the facts of the present case show there existed a confidential relationship at the time of the breach as found by the jury as a matter of law. It was, therefore, not necessary for the jury to make a determination of the legal status of their relationship at that specific time. *Hyde Corporation v. Huffines*, 314 S.W.2d 763, 769 (Tex. Sup. 1958). Appellant and Ballard were not only licensor and licensee, they were also joint adventurers. 46 Am.Jur.2d Joint Ventures §26 p. 47-8; *Hayton v. Appleton Mach. Co.*, 192 N.W. 168 (Wis. 1923) *United Tool & Mfg. Co. v. Gray*, 250 N.W. 312 (Mich. 1933). The duration of their relationship was specified in their contract which provided that it should continue for the life of the patents unless terminated earlier by agreement. Ballard disclosed the secret details of his invention in confidence to the president of the appellant corporation for the purpose of enabling the president to appraise its value. Their negotiations culminated in a licensing agreement. The fiduciary character of the relationship between appellant and Ballard imposed on each an obligation of utmost good faith, fairness and honesty in their dealings with each other. *Murphy v. McLaughlin*, 374 S.W.2d 754 (Tex. Civ. App. — Houston 1964, writ ref'd n.r.e.); *Starr v. Ripley*, 265 S.W.2d 225

(Tex. Civ. App. — Austin 1954, no writ). The appellant may not, without sanction of law, use the information imparted in confidence adversely to Ballard. Hyde Corporation v. Huffines, *supra*. Their relationship was not, as suggested by the appellant, simply an arms-length transaction between businessmen. The facts of the present case are distinguishable from those in Patton v. Callaway, 522 S.W.2d 252 (Tex. Civ. App. — El Paso 1975, writ ref'd n.r.e.), urged by appellant, because here there was a disclosure of confidential information whereas in *Patton* there was not. Because we have found that the record in the present case shows as a matter of law a confidential relationship existed between the parties, any error occasioned by the submission of special issue 2 and the accompanying instruction is harmless. Rule 434, T.R.C.P. We overrule, therefore, the appellant's contentions concerning this matter.

The appellant further argues in this regard that this suit is barred by the statute of limitation because the suit was not brought within two years of the date when the first alleged breach of confidential relationship must have occurred. That is, the breach could not have occurred after February 1966. Our above discussion is also applicable to this point of error. This suit was filed March 1, 1968. The jury, based on sufficient evidence, found the breach of confidence occurred first in May 1966. (Special issue 3) We hold, therefore, that the cause of action is not barred. Appellants' points of error 21 through 37 are overruled.

The appellant next complains in points of error 47 and 48 of the award of punitive damages. It is argued that even assuming the existence of a confidential relationship and breach thereof, the tort was not separate and distinct from the breach of contract and will thus not support an award of punitive damages.

As a general rule punitive damages are not recoverable in an action for breach of contract, even though the breach be malicious and oppressive. *A. L. Carter Lumber Co. v. Saide*, 168 S.W.2d 629, 631 (Tex. Sup. 1943); *McDonough v. Zamora*, 338 S.W.2d 507, 513 (Tex. Civ. App. — San Antonio 1960, writ ref'd n.r.e.). If, however, in addition to or contemporaneously with a breach of contract a tort is pled and proved, punitive damages may be recovered. It is not necessary that the tort and the contract arise out of separate and distinct transactions. The requirement is simply that both a tort and breach of contract be separately pled and proved, which appellee has done in our case. A breach of confidence may also be a breach of contract. *Hyde Corporation v. Huffines*, *supra*; *McDonough v. Zamora*, *supra*; *Briggs v. Rodriguez*, 236 S.W.2d 510, 515 (Tex. Civ. App. — San Antonio 1951, writ ref'd n.r.e.). Points of error 47 and 48 are overruled.

The appellant also contends in points of error 49 through 53 that there was no evidence to support the submission of special issue 8. In points of error 55 through 57 and 59 he contends that there was insufficient evidence to support the jury's answer thereto and that the accompanying instruction is improper as constituting a comment on the weight of the evidence. Special issues 7 and 8 and the jury answers thereto were as follows:

"SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that William Carey Crutcher of Crutcher-Rolfs-Cummings, Inc., knew or should have known of the failure to pay Sam L. Ballard royalties on the pipe bending machines and bending sets manufactured, used, rented and sold by CRC-Crose International, Inc. from May 1966, through May 17, 1972?

Answer 'We do' or 'We do not'. Answer: *We do*

If you have answered Special Issue No. 7 'We do', and only in that event, then answer:

SPECIAL ISSUE NO. 8

From a preponderance of the evidence what sum of money, if any, do you find should be recovered by Sam L. Ballard against Crutcher-Rolfs-Cummings, Inc. as punitive damages?

In connection with this issue you are instructed that punitive damages may be recovered only where there has been oppressive conduct or a reckless or malicious disregard of the rights of another. Punitive damages are intended as a warning and an example to prevent the Defendant and others from the commission of like offenses and wrongs. In a legal sense an unlawful act done willfully and purposely is, as against that person, malicious.

Answer in dollars and cents. Answer: \$650,000"

The evidence in the record which we consider to support the submission of the issue of punitive damages is that the appellant attempted to obtain from Ballard a waiver of his claim to royalties by reason of the appellant's manufacture, use or sale of hydraulically-operated bending machines; that failing in this attempt, the appellant transferred to a subsidiary the assets for the production of these machines and thereafter refused to pay royalties on the machines produced by the subsidiary; and that the machines produced by the subsidiary were substantially in accordance with or the equivalent of the vertical bending machines covered by Ballard's patent. The jury could properly infer from this conduct that the appellant, believing Ballard to have a valid claim to royalties on the hydraulically-operated machines and the appellant being unable to obtain a waiver to this claim, sought to conceal the activities giving rise to an obligation to pay royalties to purposefully injure Ballard. In summary, the appellant's conduct can be characterized as the implementation of a scheme to use the knowledge of the invention, which was given in confidence, to the detriment of Ballard.

The objection leveled by the appellant to the instruction accompanying special issue 8 at the trial was that the instruction was "improper in that it constitutes a comment on the weight of the evidence." However, the appellant now argues in his brief that the instruction would allow the jury to answer affirmatively if they found that the appellant's conduct had been "reckless" or "oppressive". The appellant has thus failed to point out distinctly in his objection to the charge of the court the grounds which he asserts here. The defect is therefore waived. Rule 274, T.R.C.P.; *Northshore Bank v. Palmer*, 525 S.W.2d 718 (Tex. Civ. App. — Houston (14th Dist.) 1975 writ ref'd n.r.e.). The appellant's points of error 50 through 53, 55 through 57 and 59 are overruled.

The appellant in point 54 further contends that the award of punitive damages is excessive. We cannot agree. The amount to be awarded as punitive damages rests largely within the discretion of the jury and unless the award is so large as to indicate that it is a result of passion, prejudice or corruption, or that evidence has been disregarded, the award will not be set aside. The appellant has not demonstrated to us that the award is the result of any of those matters. *Bond v. Duren*, 520 S.W.2d 460 (Tex. Civ. App. — Waco 1975, writ ref'd n.r.e.) Appellant's point 54 is overruled.

The appellant further complains in point of error 58 of the submission of special issue 7 because it is evidentiary, without pleading and constitutes a comment on the weight of the evidence. The appellant, however, has not briefed this point and we shall consider it waived. Rule 418, T.R.C.P.

In points of error 60 through 68 the appellant complains of special issue 1 and the jury's answer thereto. The issue and answer were as follows:

"SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the pipe bending machines and bending sets manufactured, used, rented or sold by CRC-Croze International, Inc. between May 1966 and May 17, 1972 were substantially in accordance with, or the equivalent of, the Ballard pipe bending machine and bending sets as covered by claims 6, 23 or 24 of the Ballard Patent?

You are instructed that, in order to answer the foregoing Special Issue 'We do', you must find that each such machine contains all of the elements of claim 6, 23 or 24, or their equivalents. A claim does not cover a machine if any element of the claim is absent or omitted from the machine, unless there is an equivalent element in the machine, or that which remains does all that the former combination did. An equivalent element is defined as an element that performs substantially the same function in substantially the same way to obtain the same result.

Answer 'We do' or 'We do not'. Answer: *We do*"

The appellant urges that special issue 1 incorrectly defines the scope or coverage of the Ballard patent and contends that the proper definition of the protection afforded the holder of a patent is a matter strictly within the area of federal law. Ballard does not, however, claim damages for the infringement of his patent. The fact that his device is patented is merely incidental to his cause of action. The rights he seeks to protect are those which arise under the contract and the confidential relationship. It has been held that such a suit is not within the patent laws of the United States. *Lockett v. Delpark*, 270 U.S. 496, 502 (U.S. Sup. Ct. 1926). The technicalities of federal patent laws are not determinative of Ballard's rights under the subject contract and confidential relationship. *Saco-Lowell Shops v. Reynolds*, 141 F.2d 587, 596-97 (4th Cir.

1944). Without approving the form and substance of special issue 1, we overrule points of error 60 through 68.

The judgment of the trial court is affirmed.

/s/ HORACE S. YOUNG
Associate Justice

Opinion delivered and
filed this the 30th
day of June .., 1976.

APPENDIX B

B-1

May 17, 1955

S. L. BALLARD
PIPE BENDING MACHINE

2,708,471

Filed March 27, 1950

6 Sheets-Sheet 1

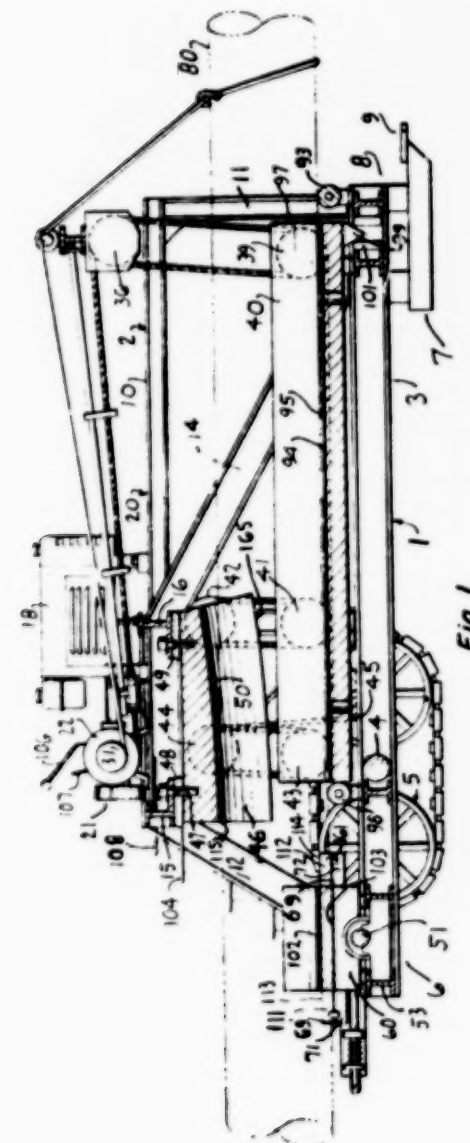


Fig. 1

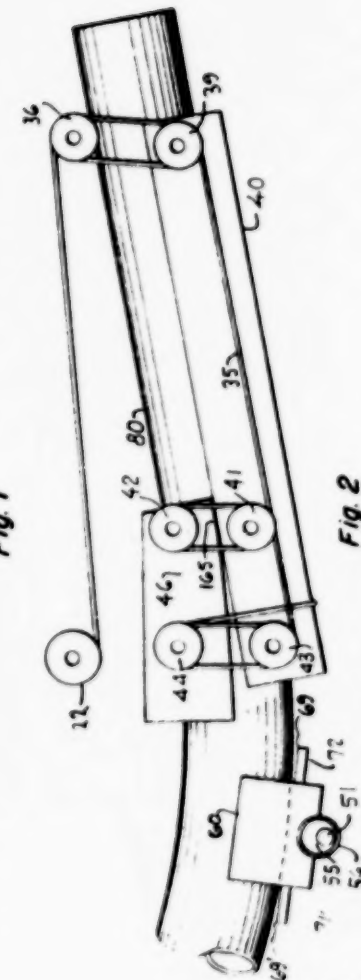


Fig. 2

INVENTOR.
Sam L. Ballard
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& Ray L. Smith
Attorneys

B-2

May 17, 1955

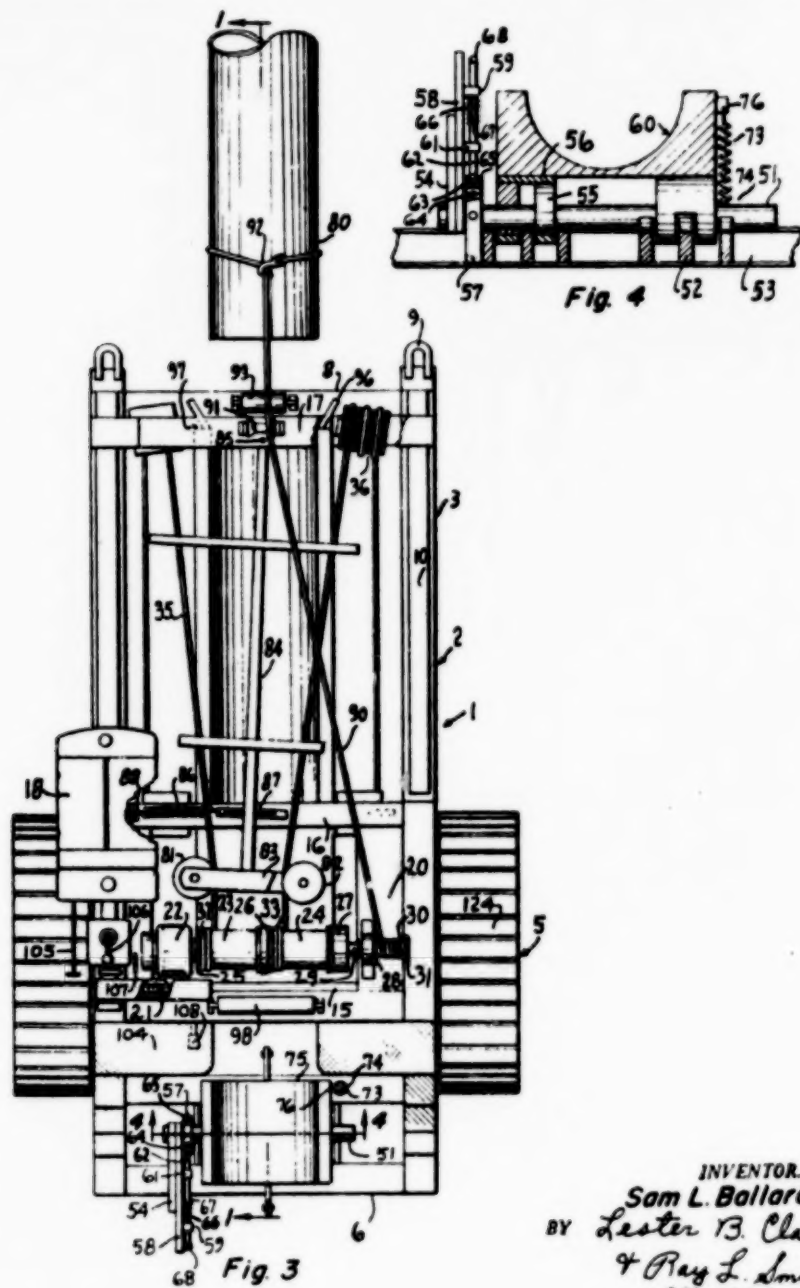
S. L. BALLARD

2,708,471

PIPE BENDING MACHINE

Filed March 27, 1950

6 Sheets-Sheet 2



INVENTOR.
Sam L. Ballard
BY Lester B. Clark
& Ray L. Smith
Attorneys

B-3

May 17, 1955

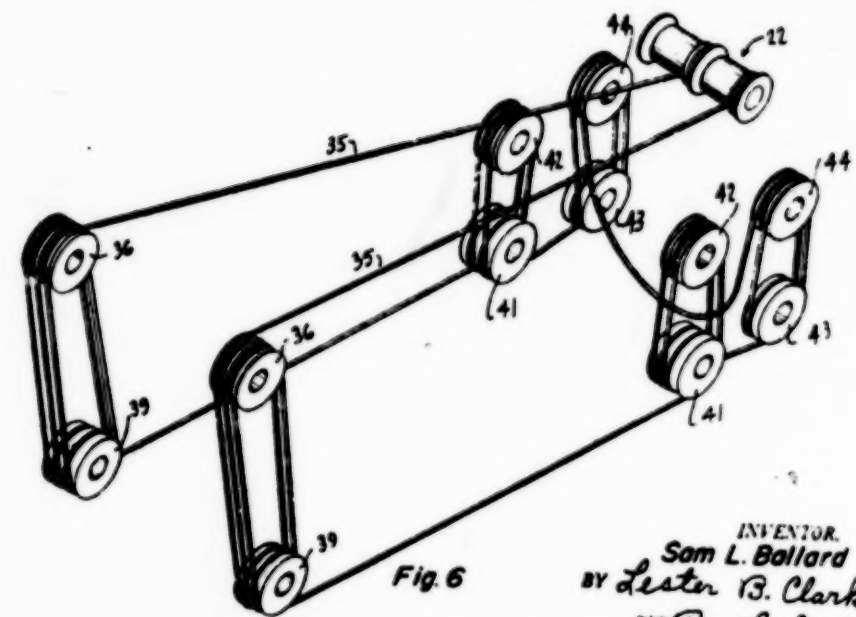
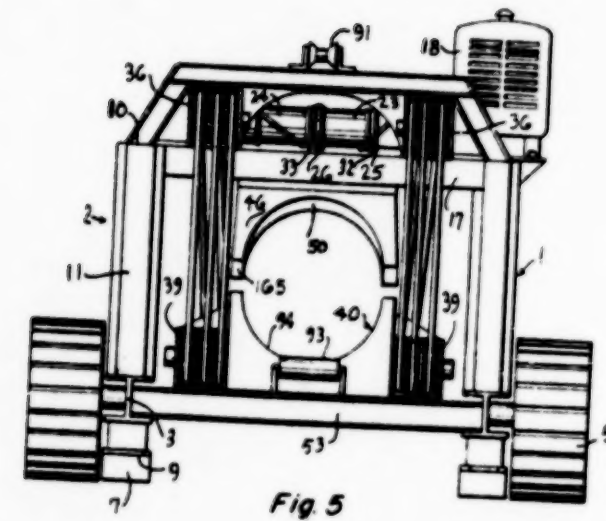
S. L. BALLARD

2,708,471

PIPE BENDING MACHINE

Filed March 27, 1950

6 Sheets-Sheet 3



INVENTOR.
Sam L. Ballard
BY Lester B. Clark
& Ray L. Smith
Attorneys

B-4

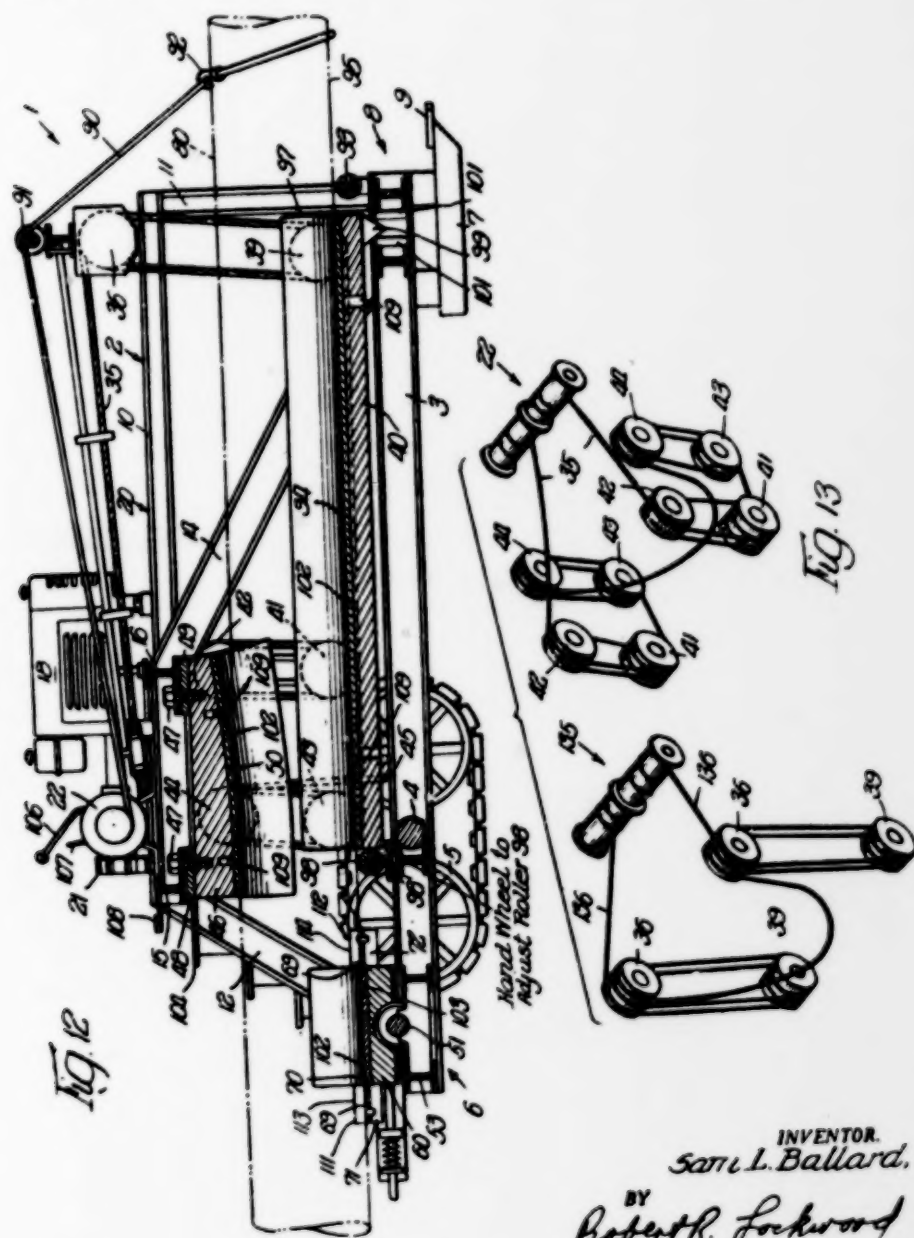
May 17, 1955

S. L. BALLARD
PIPE BENDING MACHINE

2,708,471

6 Sheets-Sheet 6

Filed March 27, 1950



INVENTOR.
Sam L. Ballard
BY Robert R. Lockwood
attor

B-5

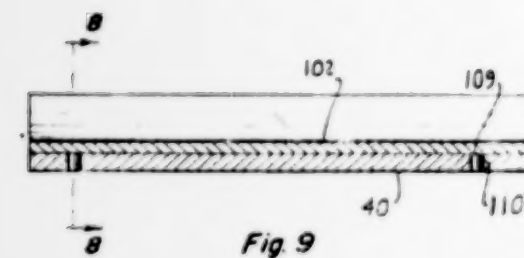
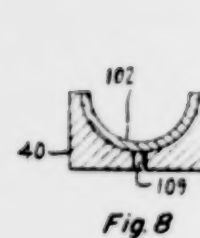
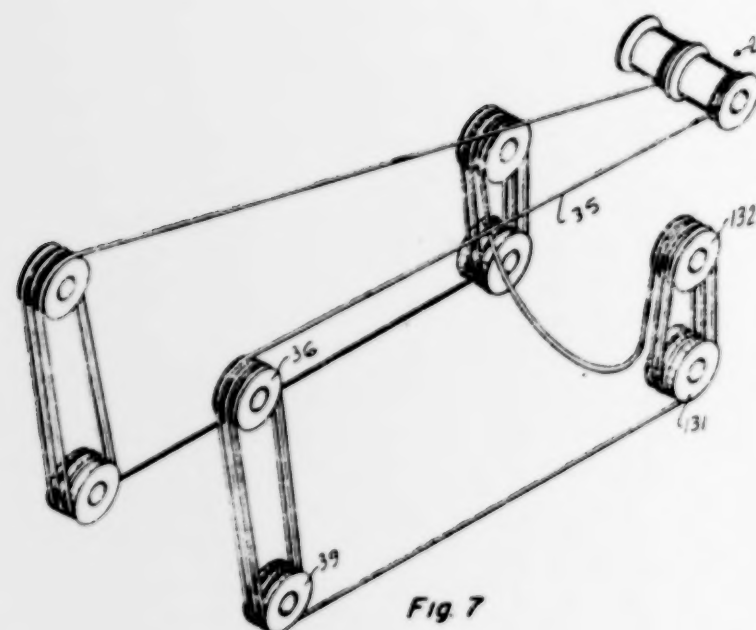
May 17, 1955

S. L. BALLARD
PIPE BENDING MACHINE

2,708,471

6 Sheets-Sheet 4

Filed March 27, 1950



INVENTOR.
Sam L. Ballard
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+ Ray L. Smith
Attorneys

B-6

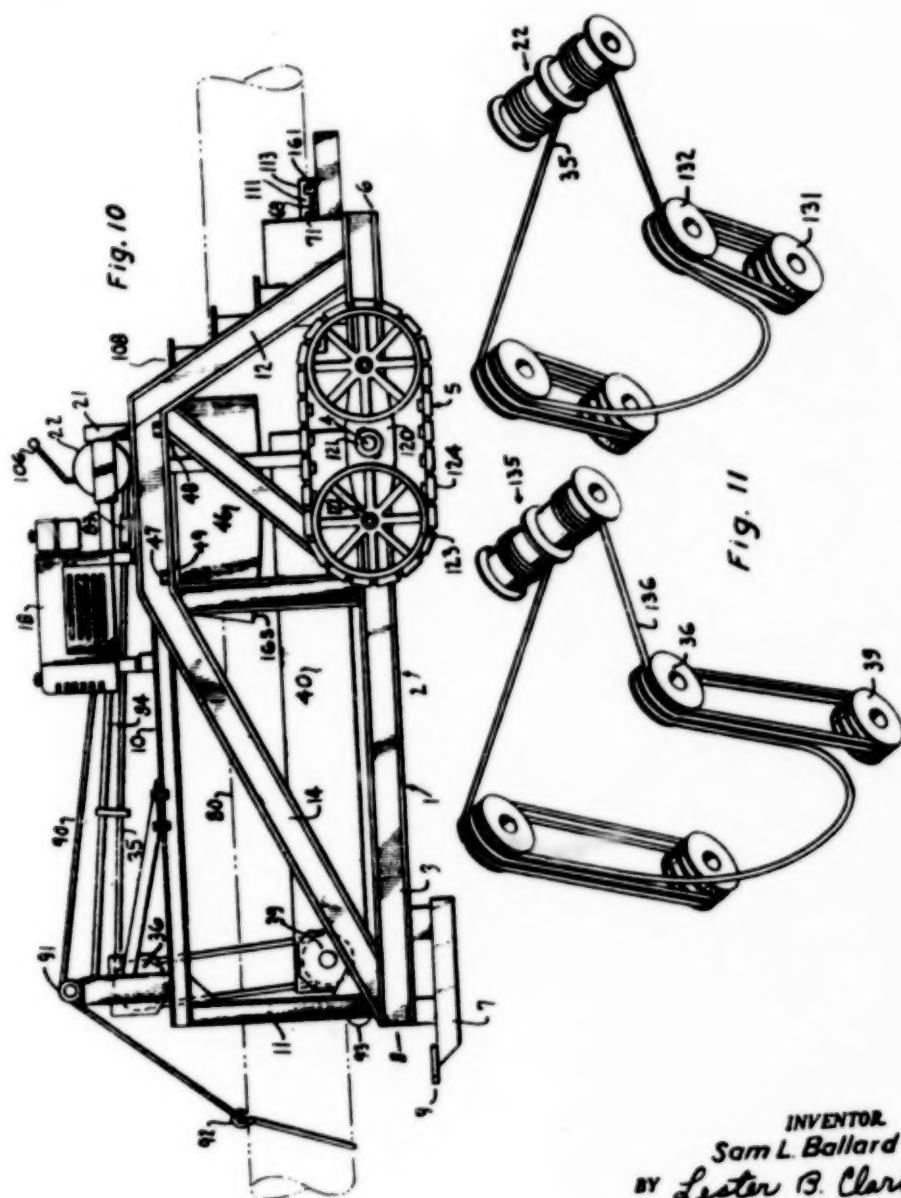
May 17, 1955

S. L. BALLARD
PIPE BENDING MACHINE

2,703,471

6 Sheets-Sheet 5

Filed March 27, 1950



INVENTOR
Sam L. Ballard
BY *Lester B. Clark*
+ *Ray L. Smith*
Attorneys

B-7

2,708,471

PIPE BENDING MACHINE

Sam L. Ballard, Houston, Texas

Application March 27, 1950, Serial No. 152,252

25 Claims. (Cl. 153-32)

This invention relates to a pipe bending machine adapted to bend pipe vertically upward; it also relates to a pipe bending machine adapted to bend pipe against a fixed die as a fulcrum by actuating a strongback to move the pipe into the fixed die and to apply a bending force to one end of the pipe while the pipe is held on the opposite side of the fixed die from said bending force by a holding shoe; and it also relates to the employment of cable and pulley means to move the strongback to bend the pipe.

It is an object of this invention to provide a pipe bending machine having a fixed die as a bending fulcrum to receive an upper portion of the pipe, a holding shoe spaced from the fixed die to receive a lower pipe portion, and a strongback suspended below the fixed die and underextending the fixed die opposite the holding shoe and adapted to move the pipe upwardly into the fixed die, and to have a bending force applied to the underextending portion to bend the pipe.

It is a further object of this invention to provide a pipe bending machine having a fixed die as a bending fulcrum, a holding shoe spaced from the fixed die, and a strongback positioned parallel to the fixed die and extending beyond the fixed die opposite the holding shoe, and cable means adapted to move the strongback to carry pipe therein against the fixed die, and to move the extending strongback portion to bend the pipe around the fixed die as a fulcrum while the shoe holds the pipe.

It is another object of this invention to provide a machine of this class in which the strongback is moved by a driven drum actuated cable loops extending on either side of the frame over bending pulleys on the frame and extending strongback end, fulcrum pulleys on the strongback and frame adjacent the inner die end, and snubbing pulleys on the frame and strongback end adjacent the outer die end; the loop being completed below the strongback between the snubbing pulleys.

It is still another object of this invention to provide a machine of this class in which the strongback is moved by a driven drum actuated cable loop extending on either side of the frame over bending pulleys on the frame and extending strongback end, and fulcrum pulleys on the frame and strongback end adjacent the die; the loop being completed below the strongback between the fulcrum pulleys.

It is still a further object of this invention to provide a machine of this class having a holding shoe which may be adjusted and locked to hold successive sections of bent pipe moved thereinto, and which shoe has means thereon to protect the pipe from being marred by the shoe while unlocked during adjustment.

It is yet a further object of this invention to provide a pipe bending machine of this class which is equipped with liners for the strongback and holding shoe to convert these elements to accommodate pipe of lesser than the maximum diameter for which the machine is designed, and which has rollers on either end of the strongback vertically adjustable to permit various diameter pipe to be loaded over the strongback when in lowered position, the inner roller complementing stop means on the other end of the strongback to position the lowered strongback.

It is still a further object of this invention to provide a pipe bending machine of this class having cable ends main-

tained to extend parallel from flange separated driven drum sections into contact with spacer pulley sheaves mounted on a spring connected bracket pivoted to the frame.

It is yet another object of this invention to provide a pipe bending machine of this class equipped with means thereon for handling the pipe to be bent, as by successively loading portions of pipe into the machine.

It is still a further object of this invention to provide a pipe bending machine of this class having a power means, as an engine thereon for actuating the cable winch, with a platform adjacent thereto from which an operator may control engine and winch.

It is also an object of this invention to provide a pipe bending machine of this class having a fixed die with bed radially curved upwardly and toward the pipe bending end of the machine, the radially extending side surfaces of the die adjacent the bed also being curved upwardly and toward the bending end to avoid contact with the strongback as the pipe is bent.

It is a further object of this invention to provide pipe bending machines of this class having the cable through the bending pulleys actuated by one driving means, as a winch, and having the cable through the fulcrum pulleys, or the combined fulcrum and snubbing pulleys actuated by a separately controlled driving means.

Other and further objects will be obvious when the specification is considered in connection with the drawings in which:

Fig. 1 is a side elevation of one modification of the machine taken along line 1-1 of Fig. 3.

Fig. 2 is a fragmentary, partially diagrammatic side elevation showing bending carried out by the machine of Fig. 1.

Fig. 3 is a plan view of a machine.

Fig. 4 is a sectional elevation taken along line 4-4 of Fig. 3.

Fig. 5 is a forward end view of a machine.

Fig. 6 is a diagram of the bending apparatus of the machine of Fig. 1.

Fig. 7 is a diagram of an optional bending apparatus.

Fig. 8 is a sectional elevation taken along line 8-8 of Fig. 9.

Fig. 9 is a sectional elevation through a lined die, shoe, or strongback.

Fig. 10 is a side elevation from the opposite side of the machine shown in Fig. 1.

Fig. 11 is a diagrammatic view showing still another optional form of bending apparatus.

Fig. 12 is a view, similar to Fig. 1, showing the application of the liners to the fixed die, strongback and holding shoe.

Fig. 13 is a diagrammatic view of another cable, pulley and winch arrangement.

As shown in Fig. 1, the frame 2 of a pipe bending machine 1 has the lower beams 3 thereof connected by means of the axle 4 to a supporting traction means, as the caterpillar 5 near the rear end 6 of the frame. The skids 7 are connected to support the forward end 8 of the frame and a power traction means may be connected to the skid ring 9 to move the machine from place to place.

The uprights 11, slanted columns 12, and cross-braces 14 support the frame top beams 10 above the beams 3, and as shown in Fig. 3, cross-beams 15, 16, and 17 cross-connect

the beams 10 while suitable corresponding members therebelow cross-connect the beams 3.

The power means, as a suitable internal combustion engine 18, is mounted on the frame top 20, and connected by the drive belt 21 to drive the winch 22. The winch 22 has two drum sections 23 and 24 separated by the flanges 25, 26, and 27, and outwardly of the journal 28 for the shaft 29, it has a smaller diameter drum section 30 terminating outwardly in the end flange 31.

The cable end 32 is connected to the drum section 23 adjacent the flange 25 and the cable end 33 is connected to the drum section 24 adjacent the flange 26. From each drum the cable 35 extends over a pulley or pulley block 36 on the frame end 8 to the pulley 39 on the strongback 40 to a pulley 41 on the strongback to a pulley 42 thereabove on the frame 2 back to the pulley 41 and from thence to the pulley 43 on the strongback and up to the pulley 44 on the frame thereabove, and finally the cable extends under the strongback 40 to complete the loop 45 between the pulleys 44 on opposite sides of the frame 2.

The die or radially curvey shoe 46 is removably fixed to the frame below the frame top 20 by means of the cap screws 47 which pass through the flange fleet feet 48 and 49 of the cross-beams 15 and 16 respectively. The bed 50 of the die is formed to receive substantially the upper semi-periphery of a pipe portion bent longitudinally to conform to the radius of curvature of the bend.

On the rear portion 6 of the frame 2, the eccentric shaft 51, as shown most clearly in Fig. 4, is journaled in the longitudinally extending journal members 52 between the lower cross beams 53 and in the journal bracket 54. This eccentric shaft 51 has the eccentric members 55 rigidly connected thereto to turn in the rings 56 which are rigidly connected to the holding shoe 60.

On one side of the shoe 60 a ring 57 is provided and connected to the frame to extend around the shaft 51. An arm 58 is rigidly connected to the shaft 51 adjacent to, and just outwardly of the ring 57. The arm 58 has the bearing lug 59 thereon and also the guide lug 61. The pointed rod 62 slidably extends through these lugs 59 and 61 so that the point 63 may be partially inserted into the spaced radial holes 64 in the ring rim 65. A compression spring 66 is connected at 67 into the rod 62 and extends around the rod to bear against the lug 59 and to normally urge the rod 62 into the ring 57. The handle 68 on the rod 62 is provided for lifting the rod from one hole 64 so that it may be spaced in another hole.

As demonstrated most clearly in Fig. 2, the shoe 60 has lugs 71 and 72 extending on either side thereof with the top sides 69 and 69' of these lugs being substantially parallel extensions of a horizontal plane through the lowest point of the bed 70 of the shoe 60. Also, as shown in Fig. 2, the shoe is substantially straight and substantially shorter in length than the fixed die 46. The spring 73 is connected to the frame 2 at 74, as shown in Fig. 4, and to the inner end 75 of the shoe at 76 near the top thereof as shown in Fig. 3 and Fig. 4.

The rotation of the winch shaft 29 in a clockwise direction, as viewed from the right hand end of the shaft in Fig. 3 winds up the cable ends 32 and 33 on the drum sections 23 and 24 respectively. As shown in Fig. 2, after the cable has been actuated to raise the strongback 40 so as to lift the pipe 80 into contact with the die 46, further winding up of the cable bends the pipe into the curvature of the die.

In order to insure that the cable winds up evenly, the pulleys 81 and 82 are provided and mounted on the bracket 83 with disc faces to extend in a horizontal plane; the

bracket arm 84 being pivoted at 85 on the crossbeam 17 at the frame end 8. The cable 35 extends from the drum sections 23 and 24 into contact with the innermost points of the pulley sheaves, the cable end portions extending parallel to each other a distance apart equal to the distance between the cable connections adjacent the flanges 25 and 26. This spacing tends to insure that the cable winds up evenly on the drum sections.

Additionally, the spring 86 is connected to the bracket arm 84 at 87 and to the side of the frame at 88 to normally pull the pulleys in the opposite direction from the direction in which the cable winds up on the drum. This further insures that the cable does not jump about on the drum sections when the winch is first started up.

In operation pipe may be loaded into the machine from either end, but is usually loaded in from the forward end 8. To aid in positioning the pipe axially of the frame 2, the line 90 on the drum section 30 is led over the guide pulley 91 on the top portion of the frame end 8 and extended around the pipe end and connected by means of the hook 92. The winch 22 is then rotated to wind up the cable on the drum section 30 to draw the pipe 80 toward the machine 1.

After the pipe 80 has been placed on the roller 93, it is guided into the frame over the strongback 40 with the strongback bed 94 lowered, as shown in Fig. 1, below the lowermost point 95 of the pipe periphery. To insure that the pipe enters the strongback 40 the guide plates 96 are provided on either side of the strongback end 97. The line 90 is successively disconnected from the pipe 80 and moved outwardly thereon to be re-connected from time to time to assist the operation of loading the pipe into the machine. If, for any reason it might be desirable to load pipe from the end 6 instead of the end 8, an arrangement similar to the guide pulley 91 might be installed at some point on the

end 6 outward of the winch 22, or optionally a separately driven winch might be installed on the end 8.

When the pipe has been loaded in over the strongback 40 it makes contact with the vertically adjustable roller 98 at the opposite end of the strongback from the roller 93. As shown in Fig. 12, the roller 98 is adjustable vertically by a hand wheel 98'. In passing it is pointed out that this roller 98 also acts as a positioning stop for the strongback when in lowered position to complement the lug 99 of triangular cross-section fixed beneath the strongback which locates the strongback between the locating plates 101 on the forward part 8 of the frame 2.

After the pipe 80 contacts the roller 98 it may be slid farther on through the machine and into the shoe 60. As the spring 73 tilts the shoe 60 downwardly and inwardly when it is in unlocked position, the lower inner edge 75 of the shoe bed is below the entering end of the pipe, so the pipe passes into the shoe 60 without marring and delaying end to end contact between the pipe and shoe.

When finally loaded and extending outwardly from the shoe 60, the pipe is seen in the position shown by dotted lines in Fig. 1. However, in this regard it should be considered that the liner 102, shown installed in the shoe 60 in Fig. 1, would be omitted to receive the pipe 80 so that the pipe, of the largest diameter for which the machine has been designed, will rest within the bed 103 of substantially semi-peripheral contour of the largest pipe diameter.

The liners 102 are designed for installation in the basic beds of the strongback 40, die 46 and holding shoe 60, as shown in Fig. 12, to convert these elements to receive pipe of smaller diameters. These liners have location pins or dowels 109 thereon to fit corresponding holes 110 in the liners. As shown in Fig. 1 each liner for the shoe 60 has the lugs 111 and 112 thereon to correspond with the lugs 71 and

72 on the bed thereunder. The top sides 113 and 114 of the lugs 111 and 112 extend substantially parallel to the horizontal plane through the lowest point of the liner 102. The liner lugs 111 and 112 have the bars 161 welded on either side thereof to extend below and align these lugs with the shoe lugs 71 and 72.

With the pipe loaded, the operator on the platform 104 initiates the bending operation, the platform being located so that the operator can reach the engine clutch 105, the gear shift 106, the winch hand clutch 107, and the winch foot brake 108, as well as any other engine or winch controls and brakes, not shown.

It can be presumed for ordinary bending by vertical machines of this class, that broadly six essential elements are required, namely, a frame, a fixed radial die supported from the frame top with bed downwardly, a holding shoe spaced longitudinally of the frame from the fixed die with bed upwardly, a strongback suspendable with bed upwardly sufficiently beneath the fixed die to permit pipe to be loaded between the fixed die and holding shoe and underextending the fixed die in a direction therefrom opposite the holding shoe, a means to lift the strongback with pipe therein upwardly to bring the pipe into contact with the fixed die, and a means to pull upwardly near the outer end of the strongback to bend the pipe into the curved bed of the fixed die while the first means holds up the opposite end portion of the strongback to maintain the pipe therein against the fixed die bed while the holding shoe anchors the pipe portion therein against downward motion as the pipe is bent.

However, when a pipe bending machine is considered which must bend a wide variety of ranges in both wall thickness, pipe material and temper, and diameter, it often happens that a machine designed to bend thick walled pipe

has to be modified to bend thin walled pipe. Also, when it is considered that in certain usages of pipe, as in buried pipe lines which are processed externally against corrosion and other factors, and which are subjected internally to excessive fluid pressures, pipe must be employed which is free of bulges and wrinkles, it can be seen that a delicate control must be provided to bend thin walled pipe without bulging or wrinkling its surface.

In the type of machine shown in Figs. 1, 2, and 6, the bending means employed consists of the pulleys 36 and 39 which may be termed the pulling or bending block; the pulleys 41 and 42, which may be termed the "squeezing" or fulcrum block; and the pulleys 44 and 43 which may be termed the "snubbing" or wrinkle control block. More generically, the combination of pulleys 41, 42, 44, and 43 may be termed the "squeezing" or fulcrum block.

When the winch 22 is first rotated, the pulleys 41, 42, 44, and 43 remain in the vertical plane positions of Fig. 1 as the strongback 40 is lifted upwardly to bring the pipe 80 into contact with the die 46 at the end 115 of its periphery. After this contact is established the strongback begins to bend the pipe into the fixed die and the point of greatest application of the bending moment moves successively upward and to the right along the bed 50 of the die, as shown in Figs. 1 and 2.

When contact between die and pipe has first been established and bending begins, the increased tension on the cable 35 tautens the cable throughout its length and this increase causes the cable to move to the right, as final slack is taken up. Then, as the strongback 40 is pulled upwardly toward the right, the cable between pulleys 43 and 41 can be observed to move slowly to the left as the distance between pulleys 44 and 43 increases faster than the distance between pulleys 42 and 41 decreases.

The bending force increases as the strongback approaches the end of its upward travel to the right, since, in any one gear, the R. P. M. of the winch remains constant, and consequently the bending moment remains constant. As a result, the bending force increases as the bending radius or arm decreases. At this point the upwardly curved radially extending sides 165 of the fixed die 46 should be noticed, as this feature prevents interference with the strongback. As the point of application of the bending moment moves constantly to the right, as shown in Fig. 2, and toward the pulley 39 on the underextending end of the strongback, the downward pivoting of the pulley 43 with the strongback end 116 opens out the distance between pulleys 44 and 43. This increased cable length is drawn from the right of pulley 43, as explained hereinabove, and in opposition to the pull to the right which the winch exerts to bend the pipe.

Then, since the strongback is not completely rigid, but has a certain flexibility therein, the pull of the winch, which resists the spread between pulleys 44 and 43, tends to wrap the slightly flexible strongback against the pipe to the left of the theoretical point of application of the bending moment, thereby spreading the area of bending, and protecting the thin walled pipe from the wrinkling which otherwise often occurs due to the application of an excessive moment in a very localized area.

As successive lengths or portions of pipe are bent, the pipe is handled by the line 90, or by any other conventional handling means, as from an A-frame on the top 20 of the frame 2, or by a tractor on the ground in front of the machine 1, and is moved rearwardly through the frame 2 and shoe 60. When this is done, the shoe 60 is unlocked until the next adjustment is completed.

During the positioning of the pipe in the shoe, and when it is unlocked, the pipe may tend to bind at some point in the

bed of the shoe, with the result that the shoe may tilt and tend to bring either one or the other edge of the shoe into biting contact with the pipe. The lugs 71 and 72 on the shoe 60 are provided to avoid this as the top sides 69 and 69' of these lugs pivot upwardly, dependent on the direction of tilt, to contact the under side of the pipe. In cases where the shoe is lined, the lugs 111 and 112 on the liner 102 serve the same purpose, as the top sides 113 and 114 will contact the pipe, dependent upon the tilt.

When the pipe has been shifted, an operator lifts the handle 63 of the rod 62 against the pressure of the spring 66 and places the rod point 63 in the rim hole 64 corresponding to the higher tilted position of the shoe 60. The pipe is then in position for the next portion in the die to be bent.

The bracket 120 of the caterpillar 5 is trunnioned at 121 on the axle 4, and has the trunnion pins 122 at either end upon which the wheels 123 are mounted to rotate. The caterpillar track 124 is belted about the wheels 123 to supply the rear traction contact. Other traction devices, as wheels, may be employed in place of the caterpillar.

This invention is not limited to a machine having the cable and pulley arrangements hereinabove described, but any other arrangement operable on the holding shoe-fixed die-movable strongback principle is considered, as that shown in Fig. 7. In such an arrangement the winch 22 on the frame 2 has the cable 35 thereon which extends on each side of the frame, over a pulley 36 on the frame top 20 to a pulley 39 on the strongback 40, to a pulley 131 on the strongback below the fixed die 46, up to the pulley 132 on the frame adjacent the fixed die 46, back to the pulley 131, up again to the pulley 132, and under the strongback 40 to complete the loop of the cable between the pulleys 132.

This arrangement is most applicable to machines for bending thick walled pipe, as such is not likely to wrinkle

or buckle when an excessive bending moment may be applied at a very localized point. In such arrangement the pulley 132 is best located on the fixed die at some point relatively intermediate the pulleys 44 and 42 as shown in Figs. 1 and 2.

As shown in Fig. 11, the arrangement of Fig. 7 may be connected to be actuated by two separately controlled winches 22 and 135. In this case the winch 22 has the cable 35 extending therefrom over the pulley 132 on the frame adjacent the fixed die 46 and preferably centrally thereof, downwardly to the pulley 131 on the strongback 40, upwardly again to the pulley 132, and downwardly under the strongback 40 to complete the loop between the pulleys 132.

The winch 135 has the cable 136 extending therefrom to the pulley 36 on the frame end 8, then downwardly to the pulley 39 on the strongback 40, upwardly to the pulley 36, and then downwardly under the strongback 40 to complete the loop between the pulleys 36. When two winches are thus employed it is obvious that the number of cables on the bending end is greater between pulleys than on the "squeezing" or fulcrum end. It is also obvious that the independently operated winches should be synchronized, at least by co-operation between the two operators of the winches.

The arrangement of Fig. 6 can also be connected to be driven by two separately controlled winches 22 and 135 as shown in Fig. 13. In such case the winch 22 has cables extending therefrom on either side of the frame to the "squeezing" or fulcrum pulley 42 on the frame adjacent the forward part of the die 46, and from this pulley the course of Fig. 6 between the pulleys 42, 41, 43, and 44 is followed. The cable path from the forward winch is the same as hereinabove described for the arrangement of Fig. 11.

Throughout the description, the path of the cable between pulleys has been broadly discussed without giving consideration to the reeving of the pulley sheaves. Obviously, this invention is not limited to any specific number of cables, it being pointed out only that preferably a greater number of cables should be required between the pulleys 36 and 39 at the point the pulling force of the winch is applied to the bending arm of the strongback. For instance, in the arrangement of Fig. 6 there are, on each side, five cables between the pulling or bending pulleys, four cables between the fulcrum pulleys, and four cables between the "snubbing" pulleys.

This invention broadly considers a vertical pipe bending machine in which a downwardly facing fixed die acts as a fulcrum, an upwardly facing shoe holds the pipe at one end of the frame, and an upwardly facing strongback is moved to place the pipe in the fixed die and then is moved upwardly, near the frame end opposite the holding shoe, to bend the pipe.

This invention also broadly considers a pipe bending machine in which a strongback is rocked against pipe in a longitudinally curved fixed die to apply a bending moment against the pipe along a constantly changing point of bending application as the bending arm shortens toward the end of the bend.

This invention also broadly considers a pipe bending machine in which winch operated cables and pulleys, or similar means, may be employed to bend the pipe so that the point of bending moment application moves by infinitesimal lengths along the pipe to be bent.

It is herein pointed out that the locking ring for the holding shoe is subject to variation in construction. For instance, whereas the ring 57 is shown fixed to the frame this ring optionally might be fixed to the side of the hold-

ing shoe and equally satisfactory results obtained. In such case the only difference in operation would rest in the fact that the ring would be substantially concentric with the center of the eccentric 55 rather than concentric with the axis of the shaft 51.

In this specification it has been stated here and above that the strongback and holding shoe are equipped to have liners installed therein. No mention has been made of installing liners in the fixed die as in practice it has been found more convenient to provide and install a fixed die 46 for each diameter of pipe to be bent rather than to line a basic fixed die of largest diameter each time a smaller diameter of pipe is being bent. However, this practice is optional and the provision of liners in a basic die might be advantageous under certain conditions.

What is claimed is:

1. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and underextending said fixed die in a direction away from said holding shoe, pulley means on opposite sides and near the ends of said strongback and corresponding pulley means on said frame above said strongback, cable means interlaced through said pulley means, and power means for tensioning said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said fixed die.

2. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and underextending said fixed die in a direction away from said holding shoe; and means adapted to move said strongback into bending contact with the pipe including cable actuating apparatus interconnecting said frame and the end of said strongback adjacent said die and adapted to hold the pipe loaded strongback to maintain the pipe against said fixed die as a bending fulcrum, and separately controlled cable actuating means interconnecting said frame and the opposite end of said strongback and adapted to move it to bend the pipe around said die.

3. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, and a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended at one end portion below said fixed die by cable means extending on either side of said frame from a driven drum means on said frame over a first pulley on said frame to a second pulley on said strongback therebelow to a third pulley on said strongback to a fourth pulley on said

frame thereabove back to said third pulley back to said fourth pulley, the loop of said cable being completed under said strongback between said fourth pulleys, said other strongback end portion being suspended to underextend said fixed die by cable means extending on either side of said frame from a separately controlled driven drum means on said frame to a fifth pulley on said frame to a sixth pulley on said strongback end portion therebelow back to said fifth pulley, the loop of the last named cable means being completed under said other strongback end portion between said fifth pulleys.

4. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, and a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended at one end portion below said fixed die by cable means extending on either side of said frame from a driven drum means on said said frame over a first pulley on said frame to a second pulley on said strongback therebelow back to said first pulley, the loop of said cable means being completed under said strongback between said first pulleys, said other strongback end portion being suspended to underextend said fixed die by cable means extending on either side of said frame from a separately controlled driven drum means on said frame to a third pulley on said frame to a fourth pulley on said strongback end portion therebelow back to said third pulley, the loop of the last named cable means being completed under said other strongback end portion between said third pulleys.

5. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, and a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended to underextend said fixed die in a direction away from said holding shoe by cable means extending successively on each side of said fixed die from driven drum means on said frame to a first pulley thereon to a second pulley therebelow on the end of said strongback away from said holding shoe to a third pulley on said strongback to a fourth pulley thereabove on said frame back to said third pulley back to said fourth pulley, said cable means extending under said strongback between said fourth pulleys, the winding of said cable means on said drum means moving said strongback upwardly to bring the pipe into contact with and to bend the pipe around said fixed die.

6. A pipe bending machine comprising, a frame including a fixed die mounted thereon with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe mounted on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe, means adapted to move said strongback upwardly into bending contact with the pipe to bring it into contact with

and to bend the pipe around said fixed die, liner means installable in said fixed die, strongback, and holding shoe as adaptations to accommodate the pipe to be bent when such pipe is of smaller diameter than the maximum diameter pipe for which the machine is designed, and roller means on said frame between said holding shoe and said strongback and adapted for vertical adjustment to permit pipe to be loaded into said machine over the lowered position of said strongback and to accommodate various sizes of said liner means.

7. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended to underextend said fixed die in a direction away from said holding shoe by cable means interlaced through pulley means on each side of said frame and on each side and near each end of said strongback and connected to driven drum means adapted to pull on the ends of said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said fixed die, said pulley means on said frame including pulleys on opposite sides thereof above pulleys near the end of said strongback away from said holding shoe, a pair of spaced apart pulleys with disc faces horizontally supported centrally of said frame adjacent said drum means by bracket means pivoted horizontally on said frame, said drum means including flange separated sections on which the cable means ends

can wind and unwind, the spacing between the inner points of said pulleys being the same as the spacing between said cable means ends as they are wound on the respective flange separated sections of said drum means, said ends extending from said sections parallel and into contact with the inner points of said pulleys and then outwardly to said pulleys on said frame.

8. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, and a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended to underextend said fixed die in a direction away from said holding shoe by cable means interlaced through pulley means on each side of said frame and on each side and near each end of said strongback and connected to driven drum means adapted to pull on said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said fixed die, said drum means including a pair of flange separated drum sections for receiving the ends of said cable means.

9. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said

die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and underextending said fixed die in a direction away from said holding shoe, cable means interlaced through pulley means on said frame and on opposite sides and near the ends of said strongback and connected to driven drum means adapted to pull on said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said fixed die, said driven drum means including a drum section rotatable to wind up a line extending over guide pulley means on the strongback underextended end of said frame and adapted for connection to the pipe to pull it toward said machine.

10. In a pipe bending machine, the combination of, a frame having a fixed die thereon, a strongback suspended to underextend said fixed die and adapted to be moved upwardly to bend pipe in said fixed die, means for moving said strongback upwardly to bring the pipe into contact with and to bend the pipe about said die, a holding shoe mounted on rotatable eccentric means spaced from the end of said strongback underlying said die, said shoe being substantially straight and shorter in length than said fixed die and curved transversely to receive substantially the lower semi-periphery of the pipe to be bent, locking means on said frame adapted to lock said eccentric means to hold said shoe in different positions as successive bent portions of the pipe are moved into the shoe, and lugs extending longitudinally from either end of said shoe with their top sides constituting continuations of the lowermost pipe receiving surface of said shoe.

11. In a pipe bending machine, the combination, of a frame having a fixed die thereon, a strongback suspended to underextend said fixed die and adapted to be moved upwardly to bend pipe in said fixed die, means for moving said strongback upwardly to bring the pipe into contact

with and to bend the pipe about said die, a holding shoe mounted on rotatable eccentric means spaced from the end of said strongback underlying said die, said shoe being substantially straight and shorter in length than said fixed die and curved transversely to receive substantially the lower semi-periphery of the pipe to be bent, means for holding said eccentric means in adjusted position, spring means on said frame adjacent the inner end of said shoe and connected thereto to tilt said shoe downwardly and inwardly so as to avoid contact between pipe end and shoe end as a pipe is first moved into said shoe to be bent, and vertically adjustable roller means on said frame outwardly of said strongback ends to receive said lower pipe surface to be guided into said shoe.

12. In a pipe bending machine, the combination of, a frame having a fixed die thereon, a strongback suspended to underextend and to have relative longitudinal movement with respect to said fixed die and adapted to be moved upwardly to bend pipe in said fixed die, means for moving said strongback upwardly to bring the pipe into contact with and to bend the pipe about said die, a holding shoe mounted on rotatable eccentric means spaced from the end of said strongback underlying said die, said shoe being substantially straight and shorter in length than said fixed die and curved transversely to receive substantially the lower semi-periphery of the pipe bent, means for holding said eccentric means in adjusted position, and spacing stop means on said frame and said strongback to position said strongback in lower position on said frame with the end thereof adjacent said holding shoe underneath said die and the other end spaced longitudinally therefrom.

13. In a pipe bending machine, the combination of, a frame having a fixed curved die thereon, a strongback suspended to underextend said fixed die toward the front of the machine and adapted to be moved upwardly to bend

pipe in said fixed die, a holding shoe mounted on the rear end of said machine and adapted to receive substantially the lower semi-periphery of the pipe to be bent, pulley means on said frame on either side of said die and corresponding pulley means on either side and near each end of said strongback, a winch on said frame, and a cable with ends connected to said winch and extending through said pulley means on either side of said die and through said pulley means on either side of said strongback and forming a loop thereunder, and engine means on said frame connected to drive said winch to tension both ends of said cable and lift said strongback and said pipe against said die and to move said underextended strongback end upwardly to bend said pipe around said die.

14. In a pipe bending machine, the combination of, a frame having a fixed curved die thereon, a strongback suspended to underextend said fixed die toward the front of the machine and adapted to be moved upwardly to bend pipe in said fixed die, a holding shoe mounted on the rear end of said machine and adapted to receive substantially the lower semi-periphery of the pipe to be bent, pulley means on said frame on either side of said die and corresponding pulley means on either side and near each end of said strongback, a winch on said frame, a cable with ends connected to said winch and extending through said pulley means on either side of said die and through said pulley means on either side of said strongback and forming a loop thereunder, engine means on said frame connected to drive said winch to tension both ends of said cable and lift said strongback and said pipe against said die and to move said underextended strongback end upwardly to bring the pipe into contact with and to bend said pipe around said die, and platform means on said frame from which an operator can control said engine and said winch.

15. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended to underextend said fixed die in a direction away from said holding shoe by cable means interlaced through pulley means on each side of said frame and on each side and near each end of said strongback and connected to driven drum means adapted to pull on the ends of said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said fixed die, said pulley means on said frame including pulleys on opposite sides thereof above pulleys near the end of said strongback away from said holding shoe, a pair of spaced apart pulleys with disc faces horizontally supported centrally of said frame adjacent said drum means by bracket means pivoted horizontally on said frame, said drum means including flange separated sections on which the cable means ends can wind and unwind, the spacing between the inner points of said pulleys being the same as the spacing between said cable means ends as they are wound on the respective flange separated sections of said drum means, said ends extending from said sections parallel and into contact with the inner points of said pulleys and then outwardly to said pulleys on said frame, and spring means connected at one end to said frame opposite the direction of cable winding on said sections and at the other end to said bracket.

16. A pipe bending machine comprising, a frame including a fixed die curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe mounted on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially said lower semi-periphery of the pipe and spaced from said holding shoe, and means adapted to move said strongback into bending contact with the pipe with said die serving as the bending fulcrum; said means including pulley means on opposite sides of said die, corresponding pulley means on opposite sides and near the ends of said strongback, cable means reeved over said pulley means, and means for tensioning said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said die.

17. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, and a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended to underextend said fixed die in a direction away from said holding shoe by cable means extending successively on each side of said fixed die from driven drum means on said frame to a first pulley thereon to a second pulley therebelow on the end of said strongback away from said holding shoe to a third pulley on said strongback to a fourth pulley there-

above on said frame back to said third pulley to a fifth pulley on said strongback to a sixth pulley thereabove on said frame, said cable means extending under said strongback between said sixth pulleys, the winding of said cable means on said drum means moving said strongback upwardly to bring the pipe into contact with and to bend the pipe around said die.

18. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and underextending said fixed die in a direction away from said holding shoe, and means for moving said strongback into contact with the pipe and for bending the pipe around the die including cable apparatus reacting between said frame and the end portions of said strongback and tensioning means therefor for moving the latter upwardly and around said die.

19. A pipe bending machine comprising, a frame including a fixed die on its upper part with the under side thereof curved transversely to receive substantially the upper semi-periphery of a pipe to be bent and curved longitudinally to receive a bent length of the pipe, a holding shoe on said frame below and at one end of said die and curved transversely to receive substantially the lower semi-periphery of the pipe and hold the same in engagement with said die, and a substantially straight strongback curved transversely to receive substantially the lower semi-periphery of the pipe and suspended to under-extend said fixed die in a direction

away from said holding shoe by cable means interlaced through pulley means on each side of said frame and on each side and near each end of said strongback and connected to driven drum means adapted to pull on said cable means to move said strongback upwardly to bring the pipe into contact with and to bend the pipe around said die.

20. A pipe bending machine comprising, a frame, a die mounted on said frame having its under side curved transversely to receive the upper side of a pipe to be bent and curved longitudinally about an axis above and remote from said frame to receive a bent length of the pipe, holding means on said frame at one end of and below said die and disposed on the under side of the pipe to hold the same in engagement with said die, a substantially straight strongback curved transversely on its upper side to receive the under side of the pipe and disposed with one end coextensive with and underlying said die and the other end extending away from said holding means, and means for moving said strongback into contact with the pipe and for bending the pipe around the die including cable means on said frame and said one end of said strongback for lifting the latter to bring the pipe into contact with said die and to hold the same thereagainst while the pipe is being bent around said die, additional cable means on said frame and said other end of said strongback to swing the latter around said die and bend the pipe, and means for tensioning said cable means to operate as aforesaid.

21. A pipe bending machine comprising, a frame, a die mounted on the upper part of said frame having its under side curved transversely to receive the upper side of a pipe to be bent and curved longitudinally about an axis above and remote from said frame to receive a bent length of the pipe, holding means on said frame at one end of and below said die and disposed on the under side of the pipe to hold the same in engagement with said die, a substantially

straight strongback curved transversely on its upper side to receive the under side of the pipe and disposed with one end coextensive with and underlying said die and the other end extending away from said holding means, pulley means on opposite sides of said strongback at said one end and corresponding pulley means on said frame on opposite sides of said die, additional pulley means on opposite sides of said strongback and corresponding pulley means on said frame, cable means interlaced through said pulley means, and means for tensioning said cable means to move said strongback upwardly toward and around said die to bring and hold the pipe into contact with said die and to bend the pipe about said die and said remote axis.

22. A pipe bending machine for use along a pipeline right of way where a minimum of space is available for handling large diameter pipe comprising, an elongated frame, a die mounted on the upper part of said frame having its under side curved transversely to receive the upper side of a pipe to be bent and curved longitudinally about an axis above and remote from said frame to receive a bent length of pipe, holding means on said frame below and at one end of said die for engaging the under side of the pipe and holding it in engagement with said die, a substantially straight strongback curved transversely to receive the under side of the pipe and underextending said die in a direction away from said holding means, pulley means on opposite sides and near the ends of said strongback and corresponding pulley means thereabove on said frame on opposite sides of said die, cable means interlaced through said pulley means, and means for tensioning said cable means to move said strongback upwardly toward and around said die to bring the pipe into contact with said die and to bend the pipe upwardly about said die and said remote axis.

23. A pipe bending machine comprising, a frame, a die mounted on said frame having one side curved transversely to receive one side of a pipe to be bent and curved longitudinally about an axis remote from said frame to receive a bent length of the pipe, holding means on said frame at one end of said die and disposed on the opposite side of the pipe to hold the same in engagement with said die, a substantially straight strongback curved transversely to receive the opposite side of the pipe and disposed with one end coextensive with said die and the other end extending away from said holding means, and means for moving said strongback into contact with the pipe and to bring the pipe into contact with and for bending the pipe around the die including force applying means connected between the respective opposite sides of said die and strongback to reduce spreading of said sides apart on application of force sufficient to bend the pipe.

24. A pipe bending machine for use along a pipeline right of way where a minimum of space is available for handling large diameter pipe comprising, an elongated frame, a die mounted on the upper part of said frame having its under side curved transversely to receive the upper side of a pipe to be bent and curved longitudinally about an axis above and remote from said frame to receive a bent length of pipe, holding means on said frame below and at one end of said die for engaging the under side of the pipe and holding it in engagement with said die, a substantially straight strongback curved transversely to receive the under side of the pipe and underextending said die in a direction away from said holding means, force applying means reacting between the respective opposite sides of said die and strongback to reduce spreading of said sides apart on application of force sufficient to maintain said strongback in engagement with the pipe and the pipe in engagement with said die, and force applying means connected to the strongback at a location remote from said

holding means to swing said strongback around said die and bend the pipe.

25. In a pipe bender, a support, a curved bending die anchored on the support and having a bend forming face portion, a rockably mounted holding shoe adjacent one end of the die for holding a pipe in engagement therewith, a separate independently mounted stiff straight bending shoe having a part extending toward the holding shoe past the central point of the face of and directly opposing the die and overlying the bend forming face portion and a part projecting beyond the bend forming face portion in a direction away from said holding shoe, said bending shoe being free to move toward and from the die and to roll without slippage along the die, power means comprising two force applying means having spaced independent swinging connections to the bending shoe and spaced independent swinging connection to the support, said force applying means each comprising pulley means mounted on each side of the bending shoe and on each side of said support and cable means connecting the pulley means at the sides of said elements, one of said force applying means being disposed in spaced relation to the holding shoe and in the vicinity of the bending shoe so as to urge a part of the bending shoe directly toward the die to tightly embrace a pipe held therebetween and the other said force applying means being disposed beyond the die on the opposite side from the holding shoe to roll the bending shoe along the die while it is held in said pipe embracing relation with the die, and actuating means connected to said cable means operable to cause said force applying means to act conjointly on the bending shoe.

References Cited in the file of this patent

UNITED STATES PATENTS

856,847	Connors	June 11, 1907
1,289,747	Harrington	Dec. 31, 1918
1,349,219	Moore et al.	Aug. 10, 1920
1,662,131	Schonfield	Mar. 13, 1928
2,273,655	Olsen	Feb. 17, 1942
2,316,839	Claybaugh	Apr. 20, 1943

FOREIGN PATENTS

2,538	Great Britain	of 1908
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APPENDIX C

November 8, 1949

Mr. Sam Ballard
Houston, Texas

Dear Mr. Ballard:

This letter is meant to confirm a verbal understanding between you and Crutcher-Rolfs-Cummings, Inc., relative to the development of a pipe bending machine. You are to proceed immediately as an employee of Crutcher-Rolfs-Cummings, Inc. at a wage of \$100.00 per week, for the purpose of building a 30" pipe bending machine embodying principles and designs worked out by you and substantiated by you of previous dated drawings.

After the first machine has been built, Crutcher-Rolfs-Cummings, Inc. will pay the patent expense involved in securing a patent using these principles. Crutcher-Rolfs-Cummings, Inc. agrees to pay you a royalty of 5% beginning with the first machine. If in the event it is proven that no patent is obtainable, this royalty is to cease and it is to be considered as a fee for your assistance in designing the equipment. At the time the patent is issued, there will be a contract drawn up stipulating 5% royalty and other conditions relative to infringement suits.

This letter of agreement is to continue in force until such time that a contract is drawn up between Sam Ballard and Crutcher-Rolfs-Cummings, Inc.

CRUTCHER-ROLFS-CUMMINGS, INC.

Accepted By:

/s/ A. S. CRUTCHER
A. S. Crutcher

SAM BALLARD

Accepted By:

/s/ SAM BALLARD
Sam Ballard

APPENDIX D

LICENSE AGREEMENT

This license agreement, made this 6th day of December, 1954, by and between SAM L. BALLARD, of Houston, Harris County, Texas, hereinafter called "Licensor" and CRUTCHER-ROLFS-CUMMINGS, INC., a corporation of Texas having its principal place of business in Houston, Harris County, Texas, hereinafter called "Licensee";

WITNESSETH THAT:

WHEREAS, the Licensor is the owner of the following United States patent and patent applications and the inventions disclosed and claimed therein:

<u>Patent No.</u>	<u>Serial No.</u>	<u>Issued or Filed</u>
2,589,651		March 18, 1952
	152,252	March 27, 1950
	253,336	Oct. 26, 1951
	253,609	Oct. 29, 1951
	253,610	Oct. 29, 1951

and Canadian patent application Serial No. 602-584, filed June 20, 1950.

WHEREAS, Licensee is desirous of acquiring certain rights with respect to said United States patent and patent applications and said Canadian application and any patent or patents that may issue on said applications as hereinafter specified; and

WHEREAS, under date of November 8, 1949, the parties hereto entered into an agreement setting forth certain undertakings with respect to the manufacture, use and sale of pipe bending machines and pursuant to which it was understood that a contract would be drawn up between the parties hereto;

Now, THEREFORE, for and in consideration of the sum of One Dollar (\$1.00) by each to the other this day in hand

paid, and other good and valuable considerations, receipt of which is hereby acknowledged, and in further consideration of the mutual covenants and agreements hereinafter contained, the parties hereto mutually covenant and agree as follows:

ARTICLE I

GRANT

The Licensor on behalf of himself, his heirs and assigns, hereby gives and grants unto the Licensee an exclusive, indivisible right and license under the aforesaid patent and patent applications and any patent or patents which may issue thereon in the United States and Canada and under any divisions, continuations, or reissues thereof, to manufacture, have manufactured, use and sell throughout, the United States, its territories and dependencies and throughout the Dominion of Canada, apparatus embodying the aforesaid inventions and any and all modifications thereof and improvements thereon that Licensor now owns or controls or may hereafter own or control during the continuance of this agreement including the exclusive right and license to use and to permit others to use any method which may be covered by Letters Patent of the Licensor of the United States or Canada for the bending of pipe.

ARTICLE II

ROYALTY

(a) Licensee agrees to pay Licensor simultaneously with the making of each report as provided in Article III, paragraph (a) hereof a royalty of five percent (5%) of the net selling price and of the rental receipts of the pipe bending machines and photos thereof which are included therein.

(b) The aforesaid royalty payments shall be made quarterly, beginning January 1, 1954, on or before the 20th day

of April, July, October and January if any royalties shall have accrued during the preceding quarter.

(c) Said pipe bending machines shall be considered to be sold when billed out or when paid for, if paid for before delivery; but royalties paid on said pipe bending machines lost or damaged in transit, or upon pipe bending machines not accepted by the customer; or returned by the customer for credit shall be credited on future royalty payments.

(d) For the purposes of this agreement "net selling price" shall be the list price, less trade discounts actually allowed, less freight or transportation charges, and less any manufacturer's sales tax.

ARTICLE III

ACCOUNTING

(a) Licensee shall keep proper records of all pipe bending machines which it shall sell under this agreement and shall render quarterly statements or extracts from said records to Licensor specifying the number of such pipe bending machines sold or rented by it during the preceding quarter and the amount of royalty due and payable. The said statements shall be rendered at the time of making the royalty payments specified in Article II hereof.

(b) Licensee shall, when requested by Licensor so to do, verify the said statement by affidavit and shall permit Licensor, through a certified public accountant or other auditor acceptable to the Licensee, to inspect such records and to make extracts therefrom at reasonable times. Such certified public accountant or auditor shall not divulge to any one the name of any customer of Licensee.

ARTICLE IV MARKING

Licensee shall endeavor in good faith to mark pipe bending machines sold by it under the license granted to it hereunder with the numbers of the patents which have or may issue on said applications, where applicable.

ARTICLE V PAYMENT FOR PROSECUTION OF PATENT APPLICATIONS

As further consideration for the license granted to Licensee hereunder, Licensee hereby agrees to pay all expenses incident to the prosecution of the above identified patent applications in the United States and Canada and the final fees, if any.

(a) In case Licensee fails to perform any of its obligations herein described, Licensor may serve sixty (60) days' written notice upon Licensee of such default and of the termination of this agreement, and if for the complete period of sixty (60) days, Licensee continues in such default, this agreement and the license granted herein shall then be terminated, provided, however, such termination shall not relieve Licensee from payment of any royalties due and payable at the date of the termination of this agreement.

(b) Licensee shall have the right at any time after two (2) years from the date of this agreement to terminate the license granted hereunder upon ninety (90) days' notice in writing served upon Licensor, but such termination shall not operate to relieve Licensee from its liabilities for payment of royalties on sales made hereunder prior to the date of such termination.

(c) Unless previously terminated, as herein elsewhere provided, this agreement and license shall continue in full

force and effect until the full end of the term of the last to expire of the aforesaid United States patent and patents which may issue on the aforesaid United States and Canadian applications for patent or any division, continuation, or reissue thereof under which rights are or may be granted herein. It is understood, however, that Licensee shall not be required hereunder to pay royalties to Licensor under any patent, the claims of which do not cover pipe bending machines sold by Licensee, nor is Licensee required to pay royalties on pipe bending machines covered solely by claims in an expired patent.

(d) After the termination of this license agreement for any reason, Licensee may use any defenses which would have been available had this license and agreement not been entered into, and any admission of validity of Letters Patent implied by the acceptance of this license, or rights under the provisions of this agreement, shall be limited to the term and scope of this agreement and shall end with the termination thereof.

ARTICLE VII BINDING UPON SUCCESSORS, ETC.

This agreement and the covenants herein contained shall be binding upon and inure to the benefit of the heirs and assigns of the Licensor and the successors and assigns of the entire business and good will of the Licensee in pipe bending machines.

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IN WITNESS WHEREOF, the Licensor has hereunto set his hand and seal and the Licensee has caused this instrument to be executed in its name and its behalf by its duly authorized officers, attested by its corporate seal, as of the day and year first above written.

(Seal)

SAM BALLARD
Licensor

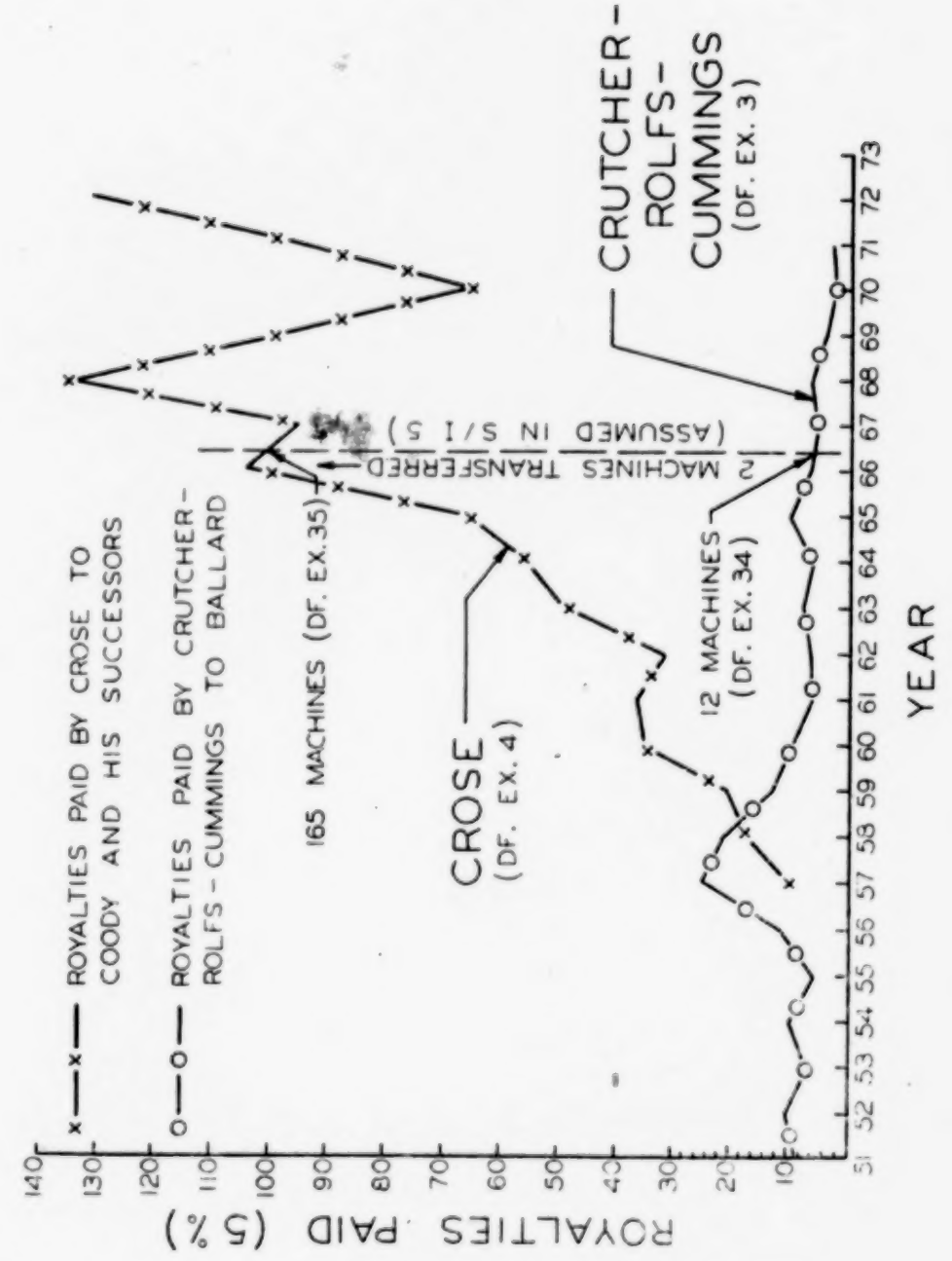
CRUTCHER-ROLFS-CUMMINGS,
INC.

By A. S. CRUTCHER
Licensee, President

ATTEST:

HAZEL TREADWAY
Secretary

APPENDIX E



APPENDIX F

F-1

No. 758904

IN THE

190th Judicial District Court

OF HARRIS COUNTY, TEXAS

SAM L. BALLARD, *an Individual,*

Plaintiff

v.

CRUTCHER-ROLFS-CUMMINGS, *a Corporation,*
CRUTCHER RESOURCES CORPORATION, *a Corporation,*
CRC-CROSE INTERNATIONAL, INC., *a Corporation,*

AND

WILLIAM CAREY CRUTCHER, *an Individual,*

Defendants

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

Comes now Sam L. Ballard, Plaintiff, complaining of Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc. and William Carey Crutcher, Defendants, and for causes of action Plaintiff would respectfully show as follows:

I.

Plaintiff is an individual residing in Kerrville, Kerr County, Texas.

(1) Defendant, Crutcher-Rolfs-Cummings, Inc. has filed its Answer herein and is before the Court for all purposes.

(2) Defendant, Crutcher Resources Corporation, has filed its Answer herein and is before the Court for all purposes.

(3) Defendant, CRC-Crose International, Inc., has filed its Answer herein and is before the Court for all purposes.

(4) Defendant, William Carey Crutcher, has filed his Answer herein and is before the Court for all purposes.

II.

On or about November 8, 1949, Plaintiff, Sam L. Ballard, and Defendant, Crutcher-Rolfs-Cummings, Inc., through its President, A. S. Crutcher, entered into an agreement under which Plaintiff began building a prototype of his invention for a pipe bending machine at such Defendant's place of business in Houston, Harris County, Texas.

Plaintiff soon completed the first pipe bending machine under the contract of November 8, 1949, and a successful test bending operation was conducted on thirty-inch pipe; that as a result of such test, he was invited to bring the pipe bending machine on a location for a gas pipeline company to bend pipe.

Plaintiff, Sam L. Ballard, thereafter filed application for letters patent in the United States Patent Office on his pipe bending machine invention, and application for United States Letters Patent having filed on March 27, 1950, and bearing Serial Number 152,252, and subsequently United States Letters Patent issued on May 17, 1955, to Plaintiff herein. Further, there have issued to Plaintiff Canadian Letters Patent covering the same invention as his United States Letters Patent.

Throughout the period from November, 1949, to the date of the death of A. S. Crutcher, President of Crutcher-Rolfs-Cummings, Inc., Ballard relied upon A. C. Crutcher and on or about December 6, 1954, the Plaintiff, Ballard, granted the Defendant, Crutcher-Rolfs-Cummings, Inc., an exclusive license to manufacture, have manufactured, use, rent and sell devices under various United States and Canadian

Patents and Patent applications. Thereafter, devices covered by United States Patent No. 2,708,471 and other Patents issued to Plaintiff, Ballard, were manufactured and sold or rented by Defendant, Crutcher-Rolfs-Cummings, Inc., and royalties were paid to Ballard thereon.

After the death of A. S. Crutcher, on or about March 30, 1964, William Carey Crutcher became President of Crutcher-Rolfs-Cummings, Inc. and negotiated the acquisition of Crose-United Corporation. Subsequently, the manufacturing, using, renting and selling of pipe bending machines were moved to Crose-United Corporation (CRC-Crose International, Inc.) and Crutcher-Rolfs-Cummings, Inc. ceased paying royalties to Ballard. Devices covered by Patents issued to Ballard have for many years been manufactured and sold or rented by CRC-Crose International, Inc., a wholly owned subsidiary of Crutcher Resources Corporation, more than 70% of which is owned by Defendant, Crutcher-Rolfs-Cummings, Inc. The Defendant, William Carey Crutcher, is the President, a Director and (with his family) owns 100% of Crutcher-Rolfs-Cummings, Inc.; is, or at material times has been, President, Chairman of the Board and a stockholder of Crutcher Resources Corporation, and is, or at material times has been, the President, a Director and Vice-Chairman of the Board of CRC-Crose International, Inc. In addition, Crutcher Resources Corporation (the parent of its wholly owned subsidiary, CRC-Crose International, Inc.) and its majority shareholder, Crutcher-Rolfs-Cummings, Inc., have, and have had, several common officers and directors, common offices and other functions, operations and locations in common.

III.

Following the cooperative efforts between Ballard and Crutcher-Rolfs-Cummings, Inc. which lead to the filing of an application for Letters Patent on Ballard's pipe bending

machine, an interference was declared by the United States Patent Office in order to determine the priority of invention between the subject matter of Ballard's application and the application of one John L. Coody, predecessor in interest to Cinch, Inc.

That, thereafter, there was filed in the United States District Court for the Southern District of Texas, Houston Division, an action entitled "*Cinch, Inc. v. Sam L. Ballard and Crutcher-Rolfs-Cummings, Inc.*", Civil Action No. 7962, seeking a reversal of the holding of the Patent Office which awarded the priority of invention to Plaintiff, Sam L. Ballard, and that after the said suit had been filed, Mr. A. S. Crutcher threatened that unless Ballard signed the Agreement dated February 9, 1954, attached to the Plaintiff's Original as an Exhibit "B" and asserted by the Defendants as an estoppel to the Plaintiff's causes of action, then Mr. Crutcher and Crutcher-Rolfs-Cummings, Inc. would not live up to the Agreement of November 8, 1949.

Mr. Crutcher also advised him that it would be to Ballard's benefit to enter into the Agreement of February 9, 1954, because Defendant, Crutcher-Rolfs-Cummings, Inc. by reason of its dominant position in the pipeline industry was in a better position to exploit the invention of Mr. Ballard and furthermore Plaintiff, Sam L. Ballard, states that Mr. Crutcher as President of Crutcher-Rolfs-Cummings, Inc. assured Plaintiff, Sam L. Ballard, that if he signed the February 9, 1954, Agreement, he would not be foregoing any royalties or any rights and this would terminate the litigation and permit Mr. Crutcher and Defendant, Crutcher-Rolfs-Cummings, Inc., to devote their entire time and activities to commercially exploiting the invention of Mr. Ballard and that as a result of the dominant position of Defendant, Crutcher-Rolfs-Cummings, Inc., in the pipeline industry at that time and that as a result of being able to settle the litigation immediately and devoting their full

time and attention to the commercial exploitation of Mr. Ballard's invention, they would outdistance and outsell Cinch, Inc. and its successors and, thus, would not in any way diminish the royalties that Mr. Ballard would receive from Defendant, Crutcher-Rolfs-Cummings, Inc., under the Agreement of November 8, 1949.

Mr. Crutcher as President of Crutcher-Rolfs-Cummings, Inc. further represented to Plaintiff, Sam L. Ballard, that it would be to Plaintiff's advantage and to Mr. Crutcher's advantage to have only a small competitor in business manufacturing and selling other machines and that it would therefore not affect Mr. Ballard's royalties under said Agreement of November 8, 1949.

Sam L. Ballard was not in a financial position to carry forward the litigation, and further in view of the fact that Mr. A. S. Crutcher, as representative of Defendant, Crutcher-Rolfs-Cummings, Inc., had threatened not to live up to the terms of the Agreement of November 8, 1949, unless Mr. Ballard signed the Agreement of February 9, 1954, and further in view of the representations of Mr. Crutcher as a representative of Defendant, Crutcher-Rolfs-Cummings, Inc., that by signing the Agreement of February 9, 1954, he would not be affected in the least by the amount of royalties that he would receive, he relied upon the representations of Defendant, Crutcher-Rolfs-Cummings, Inc. by and through Mr. A. S. Crutcher, and further in view of the threats and intimidations of Defendant, Crutcher-Rolfs-Cummings, Inc., by and through Mr. A. S. Crutcher, he entered into the Agreement of February 9, 1954.

Plaintiff, Sam L. Ballard, relied upon the representations and fiduciary obligation of Mr. Crutcher as representative of Defendant, Crutcher-Rolfs-Cummings, Inc., in stating that Defendant, Crutcher-Rolfs-Cummings, Inc., would fully commercially exploit his invention and relied upon

Mr. Crutcher's representations that by signing the Agreement of February 9, 1954, that his royalties on his invention would not in any way be diminished. Subsequently, Plaintiff, Sam L. Ballard, in further reliance on the representations of Crutcher-Rolfs-Cummings, Inc., entered into the agreement with Defendant, Crutcher-Rolfs-Cummings, Inc., referred to in the Plaintiff's First Amended Original Petition as the License Agreement of December 6, 1954.

IV.

At all material times in connection with the occurrences and transactions referred to in paragraphs II and III above, A. S. Crutcher, the Defendant, Crutcher-Rolfs-Cummings, Inc., and its subsidiary companies were in a fiduciary capacity in relation to the Plaintiff as a result of the confidential, cooperative efforts of Plaintiff and the Defendant, Crutcher-Rolfs-Cummings, Inc. and its subsidiary companies to build, develop, manufacture, sell and rent pipe bending devices and parts therefor.

V.

That by reason of the United States Letters Patent Number 2,708,471 issued to the Plaintiff, Ballard, on or about May 17, 1955, and Plaintiff's Second Amended Original Petition by reason of the licensing agreement referred to in paragraph II above entered into by Plaintiff and Crutcher-Rolfs-Cummings, Inc., such Defendant has agreed to pay a royalty of five per cent (5%) of sales and rentals received on all pipe bending devices and parts therefor as follows:

"... apparatus embodying the abovesaid inventions and any or all modifications thereof and improvements thereon that Licensor now owns or controls or may hereafter own or control during the continuance of this

agreement including the exclusive right and license to use and to permit others to use any method which may be covered by Letters Patent of the Licensor of the United States or Canada for the bending of pipe."

Plaintiff's patents, which are the subject matter of the above quoted license, cover all pipe bending devices and parts therefor which have been or which are now manufactured, used, rented or sold by Crutcher-Rolfs-Cummings, Inc. or its subsidiary companies, or all of them. Nevertheless, neither the Defendant, Crutcher-Rolfs-Cummings, Inc., nor any of its subsidiaries has paid to Plaintiff royalties on the revenue arising from the manufacture, use, rental and sale of such devices and parts therefor, but Crutcher-Rolfs-Cummings, Inc. has breached such license agreement and failed and refused to pay the Plaintiff the royalties due thereunder.

The precise amounts due to Plaintiff from Crutcher-Rolfs-Cummings, Inc. under the license agreement are unknown to Plaintiff and cannot be made known until appropriate discovery and accounting have been had, but Plaintiff would show through such procedures that the royalty amounts due under the contract would be not less than the sum of Six Hundred Thousand Dollars (\$600,000.00).

VI.

Notwithstanding the clear obligation under the license agreement to make the payments described in paragraph V. above, Defendant, Crutcher-Rolfs-Cummings, Inc., has only tendered royalty payments due on the manufacture of certain pipe bending devices and Plaintiff has retained uncashed the royalty checks thus tendered. Since such checks represent payment of amounts which are in any event due and owing, Plaintiff hereby tenders these checks for cancellation and reissuance if that is necessary, without,

however, waiving or electing any remedy or combination of remedies, but fully prays for Judgment against the Defendants as set forth elsewhere herein.

VII.

In the alternative, and only if the same be necessary, the Plaintiff would respectfully show that the Defendants, Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc., and William Carey Crutcher, have wrongfully undertaken to remove the actual manufacturing, using, renting and selling of pipe bending devices and parts therefor from the operation of Crutcher-Rolfs-Cummings, Inc. to the operation of a subsidiary corporation, controlled by Crutcher-Rolfs-Cummings, Inc., through stock ownership and interlocking officers and directors, in fraud of the rights of Plaintiff, Ballard, under his Patents and the License Agreement with Crutcher-Rolfs-Cummings, Inc. in order to avoid the payment of royalties to Plaintiff, Ballard, after Crutcher-Rolfs-Cummings, Inc. had manufactured, used, rented and sold such pipe bending machines and parts therefor and paid royalties to Ballard thereon. The Defendants, Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc., and William Carey Crutcher are therefore estopped to now assert that no royalties are due and owing to Plaintiff and in order to prevent the unjust enrichment of the Defendants as a result of their wrongful acts said Defendants should, jointly and severally, be held to be constructive trustees of all amounts which would otherwise, but for such wrongful conduct, have been due from Crutcher-Rolfs-Cummings, Inc. to Plaintiff, Ballard, under the License Agreement with Crutcher-Rolfs-Cummings, Inc. if Crutcher-Rolfs-Cummings, Inc. had itself manufactured, used, rented and sold such pipe bending devices and parts therefor under said License Agreement, instead of manufacturing, using, renting and selling being wrongfully removed.

VIII.

In the alternative, and only if the same be necessary, the Plaintiff would respectfully show that the Defendants, Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc., and William Carey Crutcher have together, or through William G. Hogue, Jr., Norman Francis, E. E. Cummings, or through other of their authorized representatives unknown to Plaintiff, conspired to intentionally, wrongfully or tortiously interfere with the contract rights of the Plaintiff, Ballard, under his License Agreement with the Defendant, Crutcher-Rolfs-Cummings, Inc. The Defendants, Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc., and William Carey Crutcher, have through their controlled, subsidiary corporations, commenced the manufacture, use, rental and sale of pipe bending devices and parts therefor covered by the Ballard Patent seeking to avoid the obligations imposed by the License Agreement between Ballard and Crutcher-Rolfs-Cummings, Inc. Defendants have wholly failed and refused to pay any royalties under the above-described License Agreement to the Plaintiff, Ballard, but have intentionally and knowingly undertaken to deprive Ballard of his rights to royalties under the License Agreement with Crutcher-Rolfs-Cummings, Inc. The Defendants or their authorized representatives were well aware of the rights of Ballard and intentionally undertook to cause Crutcher-Rolfs-Cummings, Inc. not to pay such royalties as were due to Ballard but, rather, undertook to manufacture, use, rent and sell pipe bending machines and other devices through the use of subsidiary corporations, substantially, if not wholly controlled by the Defendants. By virtue of such interference with the Plaintiff's contractual rights, the Defendants have damaged the Plaintiff in a dollar amount in excess of Six Hundred Thousand Dollars

(\$600,000.00), and further have by virtue of their intentional, willful and malicious interference with his rights entitled Plaintiff to punitive damages in the amount of Six Hundred Thousand Dollars (\$600,000.00).

IX.

Throughout the period referred to in the preceding paragraphs, Mr. A. S. Crutcher and the Defendants herein were in a fiduciary capacity relative to the Plaintiff and should not now be heard to assert the Agreement of February 9, 1954, against the Plaintiff and the Plaintiff expressly denies that he has any liability to any of the Defendants under such agreement by virtue of instituting this action against the Defendants.

X.

Plaintiff would affirmatively show that he is not in any-wise barred by limitations as to any of the Defendants herein by reason of having discovered the facts giving rise to his causes of action herein within the applicable period of limitations prior to the filing of his Original Petition herein or the filing of his First Amended Original Petition herein.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff respectfully prays that on a final hearing and accounting herein he have Judgment against the Defendant, Crutcher-Rolfs-Cummings, Inc., for unpaid royalties in excess of Six Hundred Thousand Dollars (\$600,000.00); or in the alternative, against all of the Defendants, jointly and severally, as constructive trustees for an amount equal to said unpaid royalties; or in the alternative, that he have Judgment against all of the Defendants, jointly and severally, for interference with his contractual rights in the amount of Six Hundred Thousand Dollars (\$600,000.00) plus

exemplary damages in the amount of Six Hundred Thousand Dollars (\$600,000.00); and that all costs of Court be taxed against the Defendants, jointly and severally, and that the Plaintiff have such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

JACK W. HAYDEN
Suite 1270 Park Tower South
1333 West Loop South
Houston, Texas 77027

JOHN R. FEATHER
3707 Rawlins Street, Suite 316
Dallas, Texas 75219

By

DEMAND FOR JURY

Plaintiff respectfully demands that all issues of fact herein be tried to a jury.

.....

CERTIFICATE OF SERVICE

A copy of the above and foregoing Plaintiff's Second Amended Original Petition has been served on the Defendants by United States mail, Certified Mail, Return Receipt Requested, to Mr. A. H. Evans, Vinson, Elkins, Searls, Connally & Smith, 2528 First City National Bank Building, Houston, Texas, 77002, this day of August, 1974.

.....
John R. Feather

APPENDIX G

G-1

IN THE
DISTRICT COURT OF
HARRIS COUNTY, TEXAS

190th Judicial District

No. 758,904

SAM L. BALLARD, *an individual*

v.

CRUTCHER-ROLFS-CUMMINGS, INC., a corporation, et al

**FIRST AMENDED ANSWER OF DEFENDANT
CRUTCHER-ROLFS-CUMMINGS, INC.**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now defendant Crutcher-Rolfs-Cummings, Inc., and for answer to Plaintiff's Second Amended Original Petition herein would respectfully show as follows:

I.

Defendant denies generally each and every, all and singular, the allegations in Plaintiff's Second Amended Original Petition and demands strict proof thereof.

II.

Defendant Crutcher-Rolfs-Cummings, Inc. has been in the business of manufacturing, selling and renting pipeline equipment including the cold bending of large diameter pipe, since at least as early as 1944. In November 1949, Crutcher-Rolfs-Cummings, Inc. hired Plaintiff Sam L. Ballard and agreed to pay him a royalty on the manufacture and sale of certain pipe bending machines. In March, 1950, Plaintiff Ballard filed in the U.S. Patent Office a patent application, Serial No. 152,252, for a pipe bending machine.

On November 3, 1950 the Patent Office declared an interference to determine priority of inventorship between the Ballard application (Serial No. 152,252) and an application (Serial No. 32,911) filed by John L. Coody. The Board of Patent Interferences, a part of the Patent Office which considers the evidence and renders decisions in interferences, determined that Ballard was the prior inventor of the claims in issue but that Ballard was prevented from being granted a patent on such claims because Coody had manufactured and commercially used a machine according to such claims more than one year before Ballard filed his patent application.

Thereafter, Cinch, Inc., the assignee of Coody's patent rights, believing that the award of priority to Ballard by the Board of Patent Interferences was erroneous, filed on January 15, 1954, Civil Action No. 7962 in the U.S. District Court for the Southern District of Texas, Houston Division, styled "Cinch, Inc. v. Sam L. Ballard and Crutcher-Rolfs-Cummings, Inc." The district court entered judgment on July 12, 1955 in favor of Coody and against Ballard, and found that Coody, not Ballard, was the true first inventor of the patent claims involved in the interference, and that the Board of Patent Interference Examiners erroneously awarded priority of the invention of the two counts in interference to Ballard.

After Cinch, Inc. filed suit in federal court as alleged above, Ballard, fearing that he would lose the suit and that he would not be entitled to a patent, agreed with defendant Crutcher-Rolfs-Cummings to settle the litigation (as set forth in more detail below). At and prior to that time Coody and his assignee Cinch, Inc. had been manufacturing pipe bending machines in which the bending forces were applied solely by means of hydraulic power whereas Ballard and its licensee Crutcher-Rolfs-Cummings, Inc. had been manufacturing bending machines in which the bending

forces were applied solely through cables and mechanically driven winches.

The parties settled the suit pending in federal court by Cinch agreeing not to sue Ballard and Crutcher-Rolfs-Cummings, Inc. for infringement of any patent claims under any patent which it might own by reason of the manufacturer, use, sale or rental by Crutcher-Rolfs-Cummings of cable-operated pipe bending machines. In exchange for this agreement by Cinch, Ballard and Crutcher-Rolfs-Cummings, Inc. agreed not to sue Cinch for infringement of any patent claims under any of the patents by reason of the manufacture, use, sale or rental by Cinch (including its successor, CRC-Crose International) of hydraulically-operated pipe bending machines. The settlement was incorporated in an agreement dated February 9, 1954 between Cinch, Inc., Ballard, and Crutcher-Rolfs-Cummings, a copy of which is attached to Plaintiff's Original Petition in this suit. As part of the settlement, Ballard and Crutcher-Rolfs-Cummings agreed not to contest or defend the federal suit brought by Cinch, and therefore judgment was entered against them in said federal suit as aforesaid.

Thereafter, several U.S. Patents issued to both Coody and Ballard, including Patent Nos. 2,740,452 and 2,740,453 (issued April 3, 1956) to Coody and Patent No. 2,708,471 (issued May 17, 1955) to Ballard.

On December 6, 1954 Ballard and Crutcher-Rolfs-Cummings, Inc. entered into an agreement whereby Crutcher-Rolfs-Cummings, Inc. agreed to pay royalties to Ballard in exchange for a license under Ballard's patents to make, use, sell and lease machines covered by the claims of Ballard's patents. Under this agreement defendant Crutcher-Rolfs-Cummings, Inc. was required to pay royalties to Ballard on unpatented components, such as liners and bending dies, of pipe bending machines covered by a Ballard patent.

Defendants Crutcher-Rolfs-Cummings, Inc. manufactured, used, sold, and leased pipe cable-operated bending machines and parts therefor from as early as 1950 until after plaintiff Ballard's patent 2,708,471 expired on May 17, 1972. During this time period, Defendant Crutcher-Rolfs-Cummings, Inc. has complied fully with the agreement of December, 1954, and has paid approximately \$200,000.00 in royalties to plaintiff Ballard.

In March, 1957, Cinch, Inc. sold to the M. J. Crose Manufacturing Company, Inc. all rights to the Coody patents, together with the rights and immunities from suit under the agreement of February 9, 1954 between Cinch, plaintiff Ballard, and defendant Crutcher-Rolfs-Cummings. Through a series of name changes defendant CRC-Crose International, Inc. is the successor to M. J. Crose Manufacturing Co. in ownership of the Coody patent rights and the interests of Cinch in the February, 1954, agreement, including immunities from being sued by plaintiff Ballard. In 1968, CRC-Crose International, Inc. became a subsidiary of defendant Crutcher Resources Corporation.

Defendant CRC-Crose International, Inc. and its successors have manufactured, sold and leased hydraulically-operated pipe bending machines from at least as early as 1950 until the present time. During this time, CRC-Crose International, Inc. has paid substantial royalties to inventor Coody and his successors in interest under his patents.

In the spring of 1966, defendant Crutcher-Rolfs-Cummings, Inc. purchased a substantial portion of the stock of defendant CCR-Crose International, Inc. Since the time of this stock purchase, Crutcher-Rolfs-Cummings, Inc. and CRC-Crose International, Inc. have continued their respective pipe bending businesses, that is, defendant Crutcher-Rolfs-Cummings, Inc. has continued to lease and sell cable-operated pipe bending machines while continuing to pay to plaintiff Ballard royalties therefor, and defendant CRC-

Crose International, Inc. has continued to lease and sell hydraulically operated pipe bending machines while continuing to pay royalties therefor to the successors of Coody under his patent rights.

Defendant William Carey Crutcher was hired as an employee of defendant Crutcher-Rolfs-Cummings, Inc. in February, 1964. At that time, Mr. Crutcher's father, A. S. Crutcher, was president of Crutcher-Rolfs-Cummings, Inc. Later in the spring of 1964, Mr. A. S. Crutcher died, and William Carey Crutcher was elected president of Crutcher-Rolfs-Cummings, Inc. shortly thereafter.

III.

Plaintiff's alleged causes of action in tort, if he has any, should have been brought within two years after the alleged causes of action accrued in accordance with Revised Civil Statutes of Texas, Article 5526. Plaintiff having failed to do so, the alleged causes of action are therefore barred by the aforesaid statute. Plaintiff's alleged cause of action for breach of a written contract, if he has any, should have been brought within four years after the alleged cause of action accrued in accordance with Revised Civil Statutes of Texas, Article 5527. Plaintiff having failed to do so, the alleged cause of action is therefore barred by the aforesaid statute.

IV.

Plaintiff Ballard is estopped to bring this action because he entered into the agreement of December 6, 1954 and accepted for many years substantial sums of money thereunder. Plaintiff Ballard is also estopped from bringing this action because he entered into the agreement of February 9, 1954 and defendant relied upon this compliance therewith to defendant's detriment since plaintiff wrongfully brought this action.

V.

The agreement of December 6, 1954 is unenforceable as a violation of the public policy and laws of this state and nation in that such agreement requires and compels Crutcher-Rolfs-Cummings, Inc. to pay royalties on the sales price and rental receipts received by defendant Crutcher-Rolfs-Cummings, Inc. for unpatented components for pipe bending machines.

VI.

On July 12, 1955, final judgment was entered against plaintiff Ballard in Civil Action No. 7962, styled "Cinch, Inc. v. Sam L. Ballard and Crutcher-Rolfs-Cummings, Inc." in the U.S. District Court for the Southern District of Texas, Houston Division. Said judgment remains in full force and effect, and plaintiff is therefore barred to maintain this action, and is specifically barred thereby from asserting a scope for the claims of the Ballard patent 2,708,471 that would include or encompass the hydraulically-operated pipe bending machines of defendant CRC-Croze International, Inc.

VII.

Defendant has not infringed plaintiff's patent 2,708,471, and said patent is unenforceable.

VIII.

Plaintiff's patent 2,708,471 and each and every claim thereof are invalid and void on the ground that the alleged invention purported to be patented thereby:

(a) was known or used by others in this country or patented or described in a printed publication or publications in this or a foreign country prior to the alleged invention thereof by the application for said patent;

(b) was patented or described in a printed publication or publications in this or a foreign country or was in public use or on sale in this country more than one year prior to the date of the application for said patent;

(c) was described in a patent or patents granted on an application or applications for patent by others filed in the United States before the alleged invention thereof by the applicant;

(d) was not invented by the applicant for said patent;

(e) was made in this country by another or others who had not abandoned, suppressed or concealed the same before the applicant named in said patent allegedly invented the subject matter described therein;

(f) was obvious at the time the alleged invention was made to a person having ordinary skill in the art to which the subject matter of said patent pertains.

IX.

Plaintiff's patent 2,708,471 is invalid and void on the following grounds:

(a) The specification does not contain a written description of the alleged invention, and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and does not set forth the best mode contemplated by the applicant for said patent of carrying out his alleged invention.

(b) The claims of said patent, and each of them, are vague and indefinite, and fail to particularly point

out and distinctly claim the subject matter which the applicant for said patent regarded as his alleged invention.

(c) The claims of said patent, and each of them, are too broad in covering or purporting to cover devices inoperative for the purposes intended.

X.

Plaintiff's patent 2,708,471 is invalid and void on the ground that said patent fails to disclose the entire truth respecting the alleged invention purported to be patented thereby as known to the applicant for said patent at the time of the filing of the application for said patent.

XI.

Plaintiff's patent 2,708,471 and each of the claims thereof are invalid and void on the grounds that said patent does not describe or claim any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, patentable within the Patent Laws of the United States, and that the subject matter thereof is not patentable subject matter under said laws.

XII.

Any interpretation or construction of the claims of plaintiff's patent 2,708,471 to bring within the scope thereof any machine or device made, used, sold or rented by any of the defendants renders such claim or claims invalid and void as including and covering subject matter not lawfully patentable by said patent under the Patent Laws of the United States in view of the state of the art pertaining thereto.

XIII.

By reason of the proceedings in the United States Patent Office during the prosecution of the application for plaintiff's patent 2,708,471, and the admissions and representations therein made by or on behalf of the applicant, in order to induce the grant of said Letters Patent upon said application, plaintiff is estopped to claim for said patent any construction, were the same otherwise possible, such as would cause said patent to cover or include any product or apparatus of any of the defendants.

XIV.

Plaintiff's alleged causes of action, if he has any, accrued or arose according to plaintiff's own allegations, many years prior to the date on which he brought this suit against this defendant. Plaintiff is attempting to enforce a stale demand and is, therefore, estopped from prosecuting this action. Plaintiff's unreasonable delay in bringing suit would make it difficult or impossible to ascertain the truth of the matters in controversy and render a fair judgment for the parties. Such delay on plaintiff's part, to defendant's prejudice, constituted laches for which, in equity, plaintiff's suit should be barred.

WHEREFORE, premises considered, defendant Crutcher-Rolfs-Cummings, Inc., prays for judgment in its favor, that plaintiff take nothing, that defendant have judgment against plaintiff Ballard for the recovery of royalties paid by defendant to plaintiff, and that defendant recover its costs and general relief.

Respectfully submitted,

VINSON, ELKINS, SEARLS,
CONNALLY & SMITH

By /s/ A. H. EVANS

A. H. EVANS
WILLIAM L. LAFUZE
2528 First City National
Bank Bldg.
Houston, Texas 77002
236-2356

— Attorneys for defendant
Crutcher-Rolfs-Cummings, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing FIRST AMENDED ANSWER OF DEFENDANT CRUTCHER-ROLFS-CUMMINGS, INC., was served on plaintiff by delivering a copy to his attorney of record, Jack W. Hayden, Suite 1270 Park Tower South, Houston, Texas, 77027, this 18th day of October, 1974.

/s/ A. H. EVANS

APPENDIX H

H-1

**SPECIAL ISSUE REFUSED BY
THE TRIAL COURT**

You are instructed that plaintiff Ballard is estopped from taking or asserting a position contrary to, or in conflict with, any position he took before the United States Patent Office as reflected by the file wrapper for the Ballard Patent 2,708,471.

Refused 11/14/1974
/s/ MADISON RAYBURN
Judge 80th District Court

APPENDIX I

No. 758,904

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS

80th Judicial District

SAM L. BALLARD, *an Individual*

v.

CRUTCHER-ROLFS-CUMMINGS, INC., *a Corporation, et al*

OBJECTION'S TO THE COURT'S CHARGE

BE IT REMEMBERED that on the 14th day of November, 1974, before the submission of the Court's Charge to the Jury, the following occurred in chambers of the Court, out of the presence of the Jury, to-wit:

MR. FEATHER: It is stipulated by and between the parties in the above entitled and numbered cause that the objections to the Court's charge as made by the respective parties may be dictated before the Court to the court reporter, prior to the submission of the Court's Charge herein to the Jury, and thereafter transcribed by the court reporter and submitted to the Court for his action in writing over the Court's signature.

MR. EVANS: Pursuant to the Rules.

MR. FEATHER: Pursuant to the Rules.

MR. EVANS: So stipulated.

THE COURT: All right. Does the Plaintiff have any objection to the Court's charge?

MR. FEATHER: May it please the Court, comes now the Plaintiff, Sam L. Ballard, and respectfully objects to the

submission of Special Issue No. 9 for the following reasons:

* * *

MR. EVANS: May it please the Court, comes now each of the Defendants, Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc., and William Carey Crutcher, and respectfully object to the charge on the following grounds and reasons:

As to Special Issue No. 1, the special issue is improper in that it includes the language "substantially in accordance with," rather than requesting the Jury to find whether or not there has been infringement.

We further object to the Special Issue No. 1 on the grounds that it fails to provide a response as to each of claims 6, 23 and 24.

We further object to the instruction on the ground that it includes the phrase "that which remains does all that the former combination did." That is an improper instruction and should have been stricken.

Defendants further object to Special Issue No. 1, it is overly broad, does not submit a controlling issue in the sense that the accused device may be substantially in accordance with the patent in suit, or its claims, and did not constitute an infringement.

Defendants further object on the ground that the license agreement made the basis of this suit requires payment only for where a machine or machines are covered by the patent.

* * *

That concludes, then, the objections of each of the Defendants with respect to the charge of the Court.

Thank you, Your Honor.

THE COURT: All right. Gentlemen, all objections and exceptions by the Plaintiff and Defendants not expressly granted will be denied.

.....
Attorney for the Plaintiff

.....
Attorney for the Defendant

Approved, and all objections and exceptions by the Plaintiff and Defendants not expressly granted are denied.

.....
MADISON RAYBURN,
Judge Presiding
80th Judicial District

THE STATE OF TEXAS :
COUNTY OF HARRIS :

I, W. V. REED, a Court Reporter, certified under the laws of the State of Texas, and a Notary Public in and for said county and state, hereby certify that the foregoing 11 pages constitute a full, true and correct transcript of the objections to the Court's Charge prior to the submission of the Court's Charge to the jury, as was reported by me as requested in the above numbered and entitled cause, as more fully set out in the caption hereto.

IN WITNESS WHEREOF, I have hereunto set my hand and seal as such notary public in and for the County of Harris, State of Texas, on this the 20th day of November, 1974.

.....
W. V. REED,
A Court Reporter,
Certified under the laws of the State of
Texas, and a Notary Public in and for
Harris County, Texas.

APPENDIX J

J-1

No. 758,904

IN THE
DISTRICT COURT OF HARRIS COUNTY

80th Judicial District

SAM L. BALLARD, *an Individual,*

Plaintiff

v.

CRUTCHER-ROLFS-CUMMINGS, INC., *a Corporation;*
CRUTCHER RESOURCES CORPORATION;
CRC-CROSE INTERNATIONAL, INC.;

AND

WILLIAM CAREY CRUTCHER, *an Individual,*

Defendants

J U D G M E N T

BE IT REMEMBERED that on the 29th day of October, 1974, at a regular term of this Court, came on to be heard the above entitled and numbered cause in its due order; when came the Plaintiff, Sam L. Ballard, in person and by and through his attorneys of record, and came the Defendants, Crutcher-Rolfs-Cummings, Inc., Crutcher Resources Corporation, CRC-Crose International, Inc., and William Carey Crutcher, by and through their attorneys of record, and all parties announced ready for trial; whereupon a jury of twelve (12) citizens of Harris County, Texas, were duly tested, selected, impanelled and sworn, and the trial proceeded as to all issues between Plaintiff and Defendants with a summary of the pleadings and the introduction of evidence until the 12th day of November, 1974, at which time the evidence on behalf of all parties having been concluded and the parties rested and closed their respective cases, the Court prepared the Charge of the Court and the

parties made their objections and exceptions to said Charge.

WHEREUPON, the jury was seated and charged by the Court, counsel for both parties presented their argument and the case was duly submitted to the jury; the jury having returned and deliberated, reached its unanimous verdict and returned the same to the Court as provided by law on the 15th day of November, 1974. The same was duly received in Court and ordered filed among the papers of this cause and the jury was discharged.

Instructions in accordance with Rule 226a, Texas Rules of Civil Procedure, definitions and Special Issues were submitted by the Court in the Charge of the Court and the jurors' answers to such Special Issues were as follows:

Special Issue No. 1:

Do you find from a preponderance of the evidence that the pipe bending machines and bending sets manufactured, used, rented or sold by CRC-Crose International, Inc., between May 1966 and May 17, 1972, were substantially in accordance with, or the equivalent of, the Ballard pipe bending machine and bending sets as covered by claims 6, 23 or 24 of the Ballard Patent?

You are instructed that, in order to answer the foregoing Special Issue "We do", you must find that each such machine contains all of the elements of claim 6, 23 or 24, or their equivalents. A claim does not cover a machine if any element of the claim is absent or omitted from the machine, unless there is an equivalent element in the machine, or that which remains does all that the former combinations did. An equivalent element is defined as an element that performs substantially the same function is substantially the same way to obtain the same result.

Answer "We do" or "We do not". ANSWER: We do.

Special Issue No. 2:

Do you find from a preponderance of the evidence that a confidential relationship existed between Sam L. Ballard and Crutcher-Rolfs-Cummings, Inc. from November, 1949 through February, 1966?

You are instructed that by the term "confidential relationship" as used in the above issue is meant every form of relationship between parties wherein confidence and special trust is reposed by one in another and he is justified in placing such trust and confidence in such other party and relies upon such other party to protect his interest. This relationship is based upon fair dealing and good faith, rather than legal obligation. The term includes informal relationships such as moral, social, domestic or merely personal ones, where one person trusts in and relies upon another.

Answer "We do" or "We do not". ANSWER: We do.

If you have answered Special Issue No. 2 "We do", and only in that event, then answer:

Special Issue No. 3:

Do you find from a preponderance of the evidence that Crutcher-Rolfs-Cummings, Inc. breached the confidential relationship with Sam L. Ballard by failing to pay royalties on the net revenue resulting from the manufacture, use, sale and rental of the pipe bending machines and bending set of CRC-Crose International, Inc. between May, 1966 and May 17, 1972?

Answer "We do" or "We do not". ANSWER: We do.

If you have answered Special Issue Nos. 2 & 3 "We do" and only in that event, then answer:

Special Issue No. 4:

What amount of money, if any, do you find from a preponderance of the evidence will compensate Sam L. Ballard for the breach of the confidential relationship by Crutcher-Rolfs-Cummings, Inc. in failing to pay royalties on the pipe bending machines and bending sets manufactured, used, rented and sold by CRC-Crose International, Inc. from May 1966 through May 17, 1972?

Answer in dollars and cents. ANSWER: \$674,873.02.

Special Issue No. 5:

Do you find from a preponderance of the evidence that Crutcher-Rolfs-Cummings, Inc. failed to perform under the license agreement of December 6, 1954 by transferring in 1966 the manufacturing, using, renting and selling of vertical hydraulic pipe bending machines and bending sets to CRC-Crose International, Inc.?

Answer "We do" or "We do not". ANSWER: We do.

If you have answered Special Issue No. 5 "We do", and only in that event, then answer:

Special Issue No. 6:

What amount of money, if any, do you find from a preponderance of the evidence will reasonably compensate Sam L. Ballard for the failure, if any, of Crutcher-Rolfs-Cummings, Inc. to perform under the license agreement of December 6, 1954?

Answer in dollars and cents. ANSWER: \$674,873.02.

Special Issue No. 7:

Do you find from a preponderance of the evidence that William Carey Crutcher of Crutcher-Rolfs-Cummings, Inc., knew or should have known of the failure to pay Sam L.

Ballard royalties on the pipe bending machines and bending sets manufactured, used, rented and sold by CRC-Crose International, Inc., from May, 1966, through May 17, 1972?

Answer "We do" or "We do not". ANSWER: We do.

If you have answered Special Issue No. 7 "We do", and only in that event, then answer:

Special Issue No. 8:

From a preponderance of the evidence what sum of money, if any, do you find should be recovered by Sam L. Ballard against Crutcher-Rolfs-Cummings, Inc. as punitive damages?

In connection with this issue you are instructed that punitive damages may be recovered only where there has been oppressive conduct or a reckless or malicious disregard of the rights of another. Punitive damages are intended as a warning and an example to prevent the Defendant and others from the commission of like offenses and wrongs. In a legal sense an unlawful act done willfully and purposely is, as against that person, malicious.

Answer in dollars and cents. ANSWER: \$650,000.00.

Special Issue No. 9:

Do you find from a preponderance of the evidence that Claim 6 of the Ballard Patent 2,708,471 fails to particularly point out and distinctly claim the subject matter of the Ballard invention?

In connection with the foregoing Special Issue, you are instructed that a United States Patent is presumed valid, and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

Answer "We do" or "We do not". ANSWER: We do not.

Special Issue No. 10:

Do you find from a preponderance of the evidence that Claim 23 of the Ballard Patent 2,708,471 fails to particularly point out and distinctly claim the subject matter of the Ballard invention?

In connection with the foregoing Special Issue, you are instructed that a United States Patent is presumed valid, and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

Answer "We do" or "We do not". ANSWER: We do not.

Special Issue No. 11:

Do you find from a preponderance of the evidence that Claim 24 of the Ballard Patent 2,708,471 fails to particularly point out and distinctly claim the subject matter of the Ballard invention?

In connection with the foregoing Special Issue, you are instructed that a United States Patent is presumed valid, and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

Answer "We do" or "We do not". ANSWER: We do not.

Special Issue No. 12:

Do you find from a preponderance of the evidence that the differences between the subject matter of Claim 6 of the Ballard Patent 2,708,471 and the prior patents and Figures 1-5 of the Coody Patent 2,740,452 are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the pipe bending art on March 27, 1950?

In connection with the foregoing Special Issue, you are instructed that a United States Patent is presumed valid, and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

Answer "We do" or "We do not". ANSWER: We do not.

Special Issue No. 13:

Do you find from a preponderance of the evidence that the differences between the subject matter of Claim 23 of the Ballard Patent 2,708,471 and the prior patents and Figures 1-5 of the Coody Patent 2,740,452 are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the pipe bending art on March 27, 1950?

In connection with the foregoing Special Issue, you are instructed that a United States Patent is presumed valid, and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

Answer "We do" or "We do not". ANSWER: We do not.

Special Issue No. 14:

Do you find from a preponderance of the evidence that the difference between the subject matter of Claim 24 of the Ballard Patent 2,708,471 and the prior patents and Figures 1 - 5 of the Coody Patent 2,740,452 are such that the subject matter as a whole would have been obvious to a person having ordinary skill in the pipe bending art on March 27, 1950?

In connection with the foregoing Special Issue, you are instructed that a United States Patent is presumed valid

and the burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

Answer "We do" or "We do not". ANSWER: We do not.

It appears to the Court that from the verdict of the jury and the law applicable thereto a judgment should be rendered in favor of the Plaintiff, Sam L. Ballard, and against the Defendant, Crutcher-Rolfs-Cummings, Inc., for the sum of \$674,873.02 in actual damages and for the sum of \$650,000.00 in punitive damages or a total sum of \$1,324,873.02 with interest thereon from the date of this Judgment at the rate of six per cent (6%) per annum until paid and that all costs of court should be taxed against the Defendant, Crutcher-Rolfs-Cummings, Inc.

It is therefore accordingly ORDERED, ADJUDGED AND DECREED by the Court that Sam L. Ballard, Plaintiff, do have and recover Judgment of and from Defendant, Crutcher-Rolfs-Cummings, Inc., in the sum of \$1,324,873.02, with interest at the rate of six per cent (6%) per annum thereon from the date hereof until the same be paid, for all of which in Judgment recovered let execution issue.

It is further ORDERED, ADJUDGED AND DECREED by the Court that all costs of Court on this behalf expended be taxed against the Defendant, Crutcher-Rolfs-Cummings, Inc., for all of such in Judgment recovered let execution issue if not timely paid.

It is further ORDERED, ADJUDGED AND DECREED that all relief not expressly granted in this Judgment to any party is hereby denied.

To the entry of which Judgment the Defendant, Crutcher-Rolfs-Cummings, Inc., then and there in open Court objects

and excepts and gave notice of appeal to the appropriate Court of Civil Appeals sitting in Houston, Texas.

RENDERED AND SIGNED this 23rd day of January, 1975.

/s/ MADISON RAYBURN

.....
Presiding Judge

APPENDIX K

K-1

No. 758,904

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS

80th Judicial District

SAM L. BALLARD, *an Individual*

V.

CRUTCHER-ROLFS-CUMMINGS, INC., *a Corporation*,
CRUTCHER RESOURCES CORPORATION,
CRC-CROSE INTERNATIONAL, INC.,

AND

WILLIAM CAREY CRUTCHER

**MOTION FOR JUDGMENT
NON OBSTANTE VEREDICTO**

Comes now defendant Crutcher-Rolfs-Cummings, Inc., and respectfully moves this Honorable Court for judgment non obstante veredicto and as grounds therefore would respectfully show that a directed verdict would have been proper for the following reasons:

• • •

Further, defendant Crutcher-Rolfs-Cummings is entitled to judgment non obstante veredicto and that plaintiff take nothing since there was no issue submitted to the jury from which it can be concluded that pipe bending machines manufactured, used, rented or sold by defendant CRC-Crose International were covered by the Ballard patent. Since no obligation to pay royalties to Mr. Ballard exists under the patent license unless the devices are covered by the Ballard patent, then no royalties were due Mr. Ballard as a matter of law.

Wherefore, defendant Crutcher-Rolfs-Cummings, Inc. prays that judgment non obstante veredicto be entered in favor of defendant Crutcher-Rolfs-Cummings and that plaintiff take nothing.

Respectfully submitted,

VINSON, ELKINS, SEARLS,
CONNALLY & SMITH

By

A. H. EVANS

WILLIAM L. LAFUZE
2528 First City National
Bank Bldg.
Houston, Texas 77002
(713) 236-2356

*Attorneys for defendant
Crutcher-Rolfs-Cummings, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO has been served on plaintiff by delivering a copy to his attorney of record, Jack W. Hayden, Suite 1270 Park Tower South, 1333 West Loop South, Houston, Texas 77027, this day of, 1974.

.....

APPENDIX L

No. 758,904

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS

80th Judicial District

SAM L. BALLARD, *an Individual*

v.

CRUTCHER-ROLFS-CUMMINGS, INC., *et al.*

**AMENDED MOTION FOR NEW TRIAL BY
DEFENDANT CRUTCHER-ROLFS-CUMMINGS, INC.**

TO THE HONORABLE SAID COURT:

COMES NOW, CRUTCHER-ROLFS-CUMMINGS, Defendant in the above entitled and numbered cause, and respectfully moves this Honorable Court to set aside the judgment heretofore rendered against it and to grant this Defendant a new trial for each and all of the following good and sufficient reasons:

I.

This Honorable Court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 as follows:

Do you find from a preponderance of the evidence that the pipe bending machines and bending sets manufactured, used, rented or sold by CRC-Crose International, Inc. between May 1966 and May 17, 1972 were substantially in accordance with, or the equivalent of, the Ballard pipe bending machine and bending sets as covered by claims 6, 23 or 24 of the Ballard Patent?"

because this issue defines the scope or "coverage" of a United States Letters Patent broader than the scope of such a patent as defined by the federal courts in interpret-

ing acts of Congress, such acts being authorized by Article I, Section 8, Clause 8 of the United States Constitution, in violation of the "supremacy clause," Article VI, Clause 2 of the United States Constitution.

* * *

4.

This Honorable Court erred in submitting to the jury, over the timely and proper objection of this Defendant, the instruction with Special Issue No. 1 as follows:

"You are instructed that, in order to answer the foregoing Special Issue 'We do', you must find that each such machine contains all of the elements of claim 6, 23 or 24, or their equivalents. A claim does not cover a machine if any element of the claim is absent or omitted from the machine, unless there is an equivalent element in the machine, or that which remains does all that the former combination did. An equivalent element is defined as an element that performs substantially the same function in substantially the same way to obtain the same result."

because this instruction defines the scope of "coverage" of a United States Letters Patent broader than the scope of such a patent as defined by the federal courts in interpreting acts of the United States Congress, such acts being authorized by Article I, Section 8, Clause 8 of the Constitution of the United States, in violation of the "supremacy clause," Article VI, Clause 2 of the Constitution of the United States.

* * *

43.

The Honorable Court erred in refusing to submit the following special issue to the jury:

"You are instructed that plaintiff Ballard is estopped from taking or asserting a position contrary to, or in conflict with, any position he took before the United States Patent Office as reflected by the file wrapper for the Ballard Patent 2,708,471."

This instruction is required in order that the jury might determine the proper "coverage" of a United States Letters Patent established as a matter of law by the federal courts in interpreting the federal patent laws. The omission of this instruction in the jury charge allowed the jury to give an improperly broad construction to the Ballard patent, and constitutes an attempt by a state court to enlarge the monopoly of the owner of a patent by not properly limiting its scope is in violation of the "supremacy clause," Article VI, Clause 2 of the Constitution of the United States.

* * *

111.

This Honorable Court erred in granting Plaintiff's Motion for Judgment and basing the Judgment on Special Issue No. 1 because such issue cannot support a judgment in Plaintiff's favor as a matter of law since it does not establish conclusively infringement of the Ballard patent.

* * *

120.

This Honorable Court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 because it is not a controlling issue since any answer to this issue does not establish conclusively that pipe bending machines manufactured by CRC-Croze International were covered by the Ballard patent.

* * *

134.

This Honorable Court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 because it allowed the jury to compare the pipe bending machines of CRC-Crose International with the Ballard pipe bending machine which is an improper test of infringement of a U.S. patent. This improper test resulted in broadening the scope of the U.S. patent to Ballard in violation of the "supremacy clause", Article VI, Clause 2 of the Constitution of the United States.

135.

This Honorable Court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 because it asks the jury if the pipe bending machines of CRC-Crose International were "substantially in accordance with" the pipe bending machines of the Ballard pipe bending machines as covered by certain claims of the Ballard patent which is an improper test for infringement of a U.S. patent. This improper test resulted in broadening the scope of the U.S. patent to Ballard in violation of the "supremacy clause", Article VI, Clause 2 of the Constitution of the United States.

136.

This Honorable Court erred in submitting to the jury, over the timely and proper objection of this Defendant, the instruction accompanying Special Issue No. 1 because it includes in defining an equivalent element "or that which remains did all that the former combination did" which is improper. This improper phrase allowed the jury to enlarge the proper scope of a U.S. patent, constitutes an invasion by the state into an area of law preempted by federal law, and is a violation of the "supremacy clause", Article VI, Clause 2 of the United States Constitution.

• • •

153.

This Honorable Court erred in overruling this defendant's objection to the submission of Special Issue No. 1 because said special issue is improper in that it includes the language "substantially in accordance with" rather than requesting the jury to find whether or not there has been infringement.

154.

This Honorable Court erred in overruling this Defendant's objection to the submission of Special Issue No. 1 because it fails to provide a response as to each of claims 6, 23 and 24.

155.

This Honorable Court erred in overruling this Defendant's objection to the submission of the instruction with Special Issue No. 1 because it includes the phrase "that which remains does all that the former combination did", thereby rendering such instruction improper.

156.

This Honorable Court erred in overruling this Defendant's objection to the submission of Special Issue No. 1 because it is overly broad and does not submit a controlling issue.

157.

This Honorable Court erred in overruling this Defendant's objection to the submission of Special Issue No. 1 because it improperly includes the phrase "substantially in accordance with".

158.

This Honorable Court erred in overruling this Defendant's objection to the submission of Special Issue No. 1 because it is contrary to the license agreement made the

basis of this suit which requires payment only where a machine or machines are covered by the licensed patent.

* * *

171.

This Honorable Court erred in overruling Defendant's Motion for Judgment Non Obstante Veredicto because there was no issue submitted to the jury which establishes conclusively that the pipe bending machines manufactured, used, rented or sold by Defendant CRC-Crose International were covered by the Ballard patent for which an obligation to pay Ballard royalties might exist under the patent license.

* * *

WHEREFORE, PREMISES CONSIDERED, Defendant, Crutcher-Rolfs-Cummings, Inc., respectfully prays that, upon consideration thereof, this motion be granted, that the Judgment heretofore rendered against this Defendant be set aside and this Defendant be granted a new trial upon such terms and conditions as to this Honorable Court may seem just, as well as for such other and further relief, both general and special, at law and in equity, to which this Defendant may be justly entitled.

Respectfully submitted,

VINSON, ELKINS, SEARLS,
CONNALLY & SMITH

By: /s/ A. H. EVANS
A. H. EVANS
WILLIAM L. LAFUZE
First City National Bank
Bldg.
Houston, Texas 77002
(713) 236-2356

*Attorneys for Defendant
Crutcher-Rolfs-Cummings, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing AMENDED MOTION FOR NEW TRIAL BY DEFENDANT CRUTCHER-ROLFS-CUMMINGS, INC. was served on Plaintiff by delivering a copy to his attorney of record, Jack W. Hayden, Suite 1270 Park Tower South, 1333 West Loop South, Houston, Texas 77027, this 19th day of February, 1975.

A. H. EVANS

APPENDIX M

Houston, Texas from said judgment and the overruling of said motion.

CRUTCHER-ROLFS-CUMMINGS,
INC.,
defendant-appellant

By /s/ A. H. EVANS
A. H. EVANS
WILLIAM L. LAFUZE
2528 First City National
Bank Building
Houston, Texas 77002
(713) 236-2356

*Attorneys for defendant-appellant,
Crutcher-Rolfs-Cummings, Inc.*

APPENDIX N

No. 1059

IN THE

Court of Civil Appeals

FOR THE

THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

CRUTCHER-ROLFS-CUMMINGS, INC.,

Appellant

v.

SAM L. BALLARD,

Appellee

From The 80th Judicial District Court
Harris County, Texas

**BRIEF FOR APPELLANT
CRUTCHER-ROLFS-CUMMINGS, INC.**

A. H. EVANS
WILLIAM L. LAFUZE
VINSON, ELKINS, SEARLS,
CONNALLY & SMITH
First City National Bank
Bldg.
Houston, Texas 77002
713/236-2356

*Attorneys for Appellant
Crutcher-Rolfs-Cummings, Inc.*

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• • •

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TO THE HONORABLE COURT OF CIVIL APPEALS:

Appellant, Crutcher-Rolfs-Cummings, Inc., respectfully submits this Brief in appeal from the judgment rendered in favor of appellee, Sam L. Ballard. This appeal is from the 80th Judicial District Court of Harris County, Texas, Hon. Madison Rayburn, Judge Presiding, in which appellee, Sam L. Ballard, was plaintiff and appellant, Crutcher-Rolfs-Cummings, Inc., was a defendant. For the sake of clarity, the parties will be referred to by name (Ballard or Crutcher-Rolfs-Cummings) or as they appeared in the district court.

STATEMENT OF THE NATURE OF THE CASE

This is a suit for the alleged breach of a patent license agreement and an alleged confidential relationship arising from the activities of the plaintiff-licensor and defendant-licensee. It was tried to the jury on the additional theory of an alleged conspiracy to interfere with plaintiff's contract rights by the defendant-appellant and three other co-defendants. However, plaintiff abandoned the conspiracy theory by refusing to submit any issues thereon to the jury. The jury returned its verdict and judgment was entered against appellant-defendant Crutcher-Rolfs-Cummings, Inc. only whereupon this appeal was taken.

STATEMENT OF ISSUES

The subject matter of the primary issues raised by this appeal may be categorized as follows:

I. The failure to submit issues on vicarious liability between related corporations and the assumption of controverted material facts in the issues submitted are fatal errors.

II. The proper basis for measuring damages for failing to pay royalties under a patent license agree-

ment is the amount of business lost or not done by the licensee as a result of the licensee's wrongful acts, and not the amount of business done by a third party.

III. The jury failed to find any confidential relationship prior to and apart from the license agreement or the breach of any existing confidential relationship.

IV. Transferring assets is no breach of any duty or obligation under the patent license agreement sued upon.

V. Punitive damages are improper because there is no tort separate and distinct, independent of the contract.

VI. Infringement of the licensed patent was not properly submitted to the jury and the jury's finding is not sufficient to support a judgment of infringement.

* * *

VI. PATENT INFRINGEMENT

POINT OF ERROR 60

The trial court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 as follows:

Do you find from a preponderance of the evidence that the pipe bending machines and bending sets manufactured, used, rented or sold by CRC-Crose International, Inc., between May 1966 and May 17, 1972 were substantially in accordance with, or the equivalent of, the Ballard pipe bending machine and bending sets as covered by claims 6, 23 and 24 of the Ballard Patent?"

because this issue defines the scope or "coverage" of a United States Letters Patent broader than the scope of such a patent as defined by the federal courts in interpreting acts of Congress, such acts being authorized by Article I, Section 8, Clause 8 of the United States Constitution, in violation of the "supremacy clause," Article VI, Clause 2 of the United States Constitution. [Germane to Assignments of Error 1, 134, 135, 153, 157, 158 (Tr. 165)]

POINT OF ERROR 61

The trial court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 because it is not a controlling issue since any answer to this issue does not establish conclusively that pipe bending machines manufactured by CRC-Crose International were covered by the Ballard patent. [Germane to Assignments of Error 1, 120, 134, 135, 136, 153, 156, 157, 158 (Tr. 165)]

POINT OF ERROR 62

The trial court erred in granting Plaintiff's Motion for Judgment and basing the Judgment on Special Issue No. 1 because such issue cannot support a judgment in Plaintiff's favor as a matter of law since it does not establish conclusively infringement of the Ballard patent, and therefore, does not establish conclusively a duty to pay Ballard royalties. [Germane to Assignments of Error 111, 103 (Tr. 165)]

POINT OF ERROR 63

The trial court erred in overruling Defendant's Motion for Judgment Non Obstante Verdicto because there was no issue submitted to the jury which establishes conclusively that the pipe bending machines manufactured, used, rented or sold by Defendant CRC-Crose International were covered by the Ballard patent for which an obligation to pay Ballard royalties might exist under the patent license. [Germane to Assignment of Error 171 (Tr. 165)]

POINT OF ERROR 64

The trial court erred in refusing to submit the following special issue to the jury:

"You are instructed that plaintiff Ballard is estopped from taking or asserting a position contrary to, or in conflict with, any position he took before the United

States Patent Office as reflectd by the file wrapper for the Ballard Patent 2,708,471."

because this instruction is required in order that the jury might determine the proper "coverage" of a United States Letters Patent established by the federal courts in interpreting the federal patent laws. [Germane to Assignment of Error 43 (Tr. 165)]

POINT OF ERROR 65

There was insufficient evidence to support the jury's finding to Special Issue No. 1 that the machines of CRC-Croze were covered by the Ballard patent. [Germane to Assignments of Error 2, 94, 103, 112 and 145 (Tr. 165)]

POINT OF ERROR 66

The trial court erred in overruling Appellant's Amended Motion for New Trial because there was insufficient evidence to support the jury's finding to Special Issue No. 1 that the machines of CRC-Croze were covered by the Ballard patent. [Germane to Assignments of Error 2, 94, 103, 112 and 145 (Tr. 165)]

POINT OF ERROR 67

There was no evidence to support submission to the jury of Special Issue No. 1, nor was there any evidence to support the jury's finding thereto that the machines of CRC-Croze were covered by the Ballard patent. [Germane to Assignments of Error 3, 93, 95 and 137 (Tr. 165)]

POINT OF ERROR 68

The trial court erred in overruling Appellant's Motion for Judgment Non Obstante Verdicto with respect to Special Issue No. 1 because there is no evidence that the machines of CRC-Croze were covered by the Ballard patent. [Germane to Assignment of Error 93 (Tr. 165)]

• • •

APPENDIX O

Court of Civil Appeals

THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 30th day of June, 1976. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE No. 1059 (Tr.. Ct. #758,904)

CRUTCHER-ROLFS-CUMMINGS, INC.,

Appellant

v.

SAM L. BALLARD,

Appellee

ON APPEAL TO THIS COURT FROM
HARRIS COUNTY, TEXAS

JUDGMENT

On appeal from the 80th District Court of Harris County
Opinion by Associate Justice Horace S. Young.

THIS CAUSE was submitted to the Court on December 12, 1975, on oral argument, briefs and transcript of the record; these having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby **AFFIRMED**.

It is further ordered that Appellant, Crutcher-Rolfs-Cummings, Inc., pay all costs of this appeal expended and incurred, and this decision by certified below for observance.

LARRY LUDKA, *Clerk*

APPENDIX P

No. 1059

IN THE
Court of Civil Appeals
FOR THE
THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

CRUTCHER-ROLFS-CUMMINGS, INC.,

Appellant

v.

SAM L. BALLARD,

Appellee

From The 80th Judicial District Court
Harris County, Texas

MOTION FOR REHEARING BY APPELLANT
CRUTCHER-ROLFS-CUMMINGS, INC.

A. H. EVANS
WILLIAM L. LAFUZE
VINSON, ELKINS, SEARLS,
CONNALLY & SMITH
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Attorneys for Appellant
Crutcher-Rolfs-Cummings, Inc.

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TO THE HONORABLE COURT OF CIVIL APPEALS:

Appellant Crutcher-Rolfs-Cummings, Inc. respectfully moves this Honorable Court for a rehearing and to set aside its opinion and judgment rendered in this cause on June 30, 1976, and upon final hearing, to reverse and render in favor of Appellant, or alternatively, reverse and remand for a new trial. It is not Appellant's intention to repeat the arguments made in its main and reply briefs. Rather, Appellant intends to point out what it respectfully contends are errors in this Court's opinion which ultimately require reversal of the trial court's judgment. As grounds for the granting of this motion, Appellant respectfully shows the following:

• • •

ASSIGNMENT OF ERROR 4

The Court of Civil Appeals erred in holding that "... there existed a confidential relationship at the time of breach as found by the jury as a matter of law." (Opinion, p. 10)

ASSIGNMENT OF ERROR 5

The Court of Civil Appeals erred in holding that a confidential relationship existed as a matter of law because there is no evidence of any secret or confidential information.

• • •

ASSIGNMENT OF ERROR 7

The Court of Civil Appeals erred in holding that a confidential relationship existed as a matter of law because the confidential relationship, if any, expired when the assumed secret invention was made public.

• • •

ASSIGNMENT OF ERROR 9

The Court of Civil Appeals erred in holding that Appellant breached a confidential relationship with Ballard in 1966 arising from duties created by disclosure by Ballard to Appellant of a secret invention in 1949 because Ballard elected to protect his invention by securing a United States patent and trade secret protection after the date of publication of that patent in 1955 is preempted by federal law.

• • •

ASSIGNMENT OF ERROR 46

The Court of Civil Appeals erred in holding that the United States patent laws respecting infringement are not determinative of Appellee's rights under the contract and confidential relationship involved in this case.

• • •

ASSIGNMENT OF ERROR 48

The Court of Civil Appeals erred in failing to hold that the trial court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 because it defines the scope or "coverage" of a United States Letters Patent broader than the scope of such a patent as defined by the federal courts in interpreting acts of Congress, such acts being authorized by Article 1, Section 8, Clause 8 of the United States Constitution, in violation of the "supremacy clause", Article VI, Clause 2 of the United States Constitution. (Germane to Point of Error 60)

ASSIGNMENT OF ERROR 49

The Court of Civil Appeals erred in failing to hold that the trial court erred in submitting to the jury, over the timely and proper objection of this Defendant, Special Issue No. 1 because it is not a controlling issue since any

answer to this issue does not establish conclusively that pipe bending machines manufactured by CRC-Croose International were covered by the Ballard patent. (Germane to Points of Error 61 and 62)

ASSIGNMENT OF ERROR 50

The Court of Civil Appeals erred in failing to hold that the trial court erred in overruling Defendant's Motion for Judgment Non Obstante Veredicto because there was no issue submitted to the jury which establishes conclusively that the pipe bending machines manufactured, used, rented or sold by Defendant CRC-Croose International were covered by the Ballard patent for which an obligation to pay Ballard royalties might exist under the patent license. (Germane to Point of Error 63)

ASSIGNMENT OF ERROR 51

The Court of Civil Appeals erred in failing to hold that the trial court erred in refusing to submit the following Special issue to the jury:

"You are instructed that plaintiff Ballard is estopped from taking or asserting a position contrary to, or in conflict with, any position he took before the United States Patent Office as reflected by the file wrapper for the Ballard Patent 2,708,471."

because this instruction is required in order that the jury might determine the proper "coverage" of a United States Letters Patent established by the federal courts in interpreting the federal patent laws. (Germane to Point of Error 64)

ASSIGNMENT OF ERROR 52

The Court of Civil Appeals erred in failing to hold that there was insufficient evidence to support the jury's finding

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to Special Issue No. 1 that the machines of CRC-Crose were covered by the Ballard patent. (Germane to Points of Error 65 and 66)

ASSIGNMENT OF ERROR 53

The Court of Civil Appeals erred in failing to hold that there was no evidence to support submission to the jury of Special Issue No. 1, nor was there any evidence to support the jury's finding thereto that the machines of CRC-Crose were covered by the Ballard patent. (Germane to Points of Error 67 and 68)

• • •

APPENDIX Q

Q-1

TEXAS COURT OF APPEALS
THIRTEENTH JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS
August 30, 1976

MR. WILLIAM L. LAFUZE
MR. A. H. EVANS
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
Attorneys at Law
First City National Bank Bldg.
Houston, Texas 77002

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Suite 1270
Park Tower South
1333 West Loop South
Houston, Texas 77027

MR. JOHN FEATHER
3131 Turtle Creek,
Suite 925
Dallas, Texas 75219

Re: CAUSE No. 1059
CRUTCHER-ROLFS-CUMMINGS, INC.

v.

SAM L. BALLARD

Appellant's Motion for Rehearing was today OVERRULED.
Note this ruling was handed down on MONDAY instead of
usual Thursday.

Very truly yours,

LARRY LUDKA, *Clerk*

LL:ic

APPENDIX R

No. B-6299

IN THE
Supreme Court of Texas

CRUTCHER-ROLFS-CUMMINGS, INC.,

Petitioner,

v.

SAM L. BALLARD,

Respondent.

APPLICATION FOR WRIT OF ERROR

A. H. EVANS
WILLIAM L. LAFUZE
1835 First City National
Bank Bldg.
Houston, Texas 77002
713/651-2356
*Attorneys for Petitioner
Crutcher-Rolfs-Cummings,
Inc.*

Of Counsel:

VINSON, ELKINS, SEARLS,
CONNALLY & SMITH
2100 First City National
Bank Bldg.
Houston, Texas 77002

September 27, 1976

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STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NOS. 1 AND 2

- I. The Court of Civil Appeals may not decide a case on a new theory of recovery
- II. The evidence is legally insufficient to hold that a confidential relationship existed as a matter of law
 - A. There was no trade secret in 1949
 - B. Petitioner breached no duty of wrongful use or disclosure of Ballard's alleged trade secret in 1966
 - C. Petitioner and Respondent were not joint adventurers
 - D. There was no finding of a confidential relationship by the Court of Civil Appeals before and apart from the agreement on which Respondent sued

POINTS OF ERROR NOS. 3 AND 4 (Restated)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NOS. 3 AND 4

- I. The tests for awarding punitive damages have not been satisfied
- II. There is no evidence that supports an award for punitive damages

POINTS OF ERROR NOS. 5 AND 6 (Restated)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NOS. 5 AND 6

Respondent's cause of action based on an alleged breach of confidence is barred by limitations and there is no evidence to support the actual damages in the judgment based on such breach of confidence

POINT OF ERROR NO. 7 (Restated)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR NO. 7

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The failure to submit issues on vicarious liability between parent and related corporations is fatal, and is not cured by assuming controverted material facts in the issues submitted

POINTS OF ERROR NOS. 8 AND 9 (Restated)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NOS. 8 AND 9

- I. The failure of the trial court to instruct the jury as to the proper scope of a U.S. Patent which was the subject of a patent license agreement, thus broadening the scope of the patent and Ballard's monopoly under his patent, is a violation of the Supremacy Clause of the U.S. Constitution
- II. State trade secret law may not broaden the protection which an inventor elects to secure under the federal patent laws

CONCLUSION AND PRAYER

CERTIFICATE OF SERVICE

APPENDICES (Bound in Separate Volume)

APPENDIX A - Opinion of the Court of Civil Appeals

APPENDIX B - Judgment of the trial court (including special issues and jury findings)

APPENDIX C - Plaintiff's Second Amended Original Petition (Tr. 41)

APPENDIX D - Letter-Agreement of November 8, 1949 (Pl. Ex. 3)

APPENDIX E - Patent License of December 6, 1954 confirming the letter agreement of November 8, 1949 (Pl. Ex. 15)

APPENDIX F - Chart comparing business done (based on royalties) by Petitioner and codefendant CRC-Croze International, Inc.

APPENDIX G - Chart showing corporate relationship between Petitioner and two other corporate defendants

• • •

APPLICATION FOR WRIT OF ERROR

To The Honorable Supreme Court of Texas:

Now COMES Crutcher-Rolfs-Cummings, Inc., Petitioner, and respectfully presents its application for writ of error to the Court of Civil Appeals for the Thirteenth Supreme Judicial District at Corpus Christi to review and correct errors of law committed by the Court of Civil Appeals in this cause. Petitioner's motion for rehearing was overruled by the Court of Civil Appeals on the 30th day of August, 1976.

STATEMENT OF THE CASE

This suit was brought by Sam L. Ballard against Crutcher-Rolfs-Cummings, Inc. and three other defendants to recover for breach of a patent license agreement; breach of a confidential relationship arising out of continued dealings and subjective trust; conspiracy to interfere with Respondent Ballard's contractual rights; and fraud. The jury found that Petitioner Crutcher-Rolfs-Cummings breached a confidential relationship with Respondent by failing to pay royalties on the business done by a co-defendant, CRC-Crose International, Inc.; that Petitioner breached its patent contract with Respondent by transferring certain of its assets to said co-defendant; and that punitive damages should be recovered. No special issues were submitted relating to the theories of conspiracy and fraud or relating to the other three defendants. There was no pleading, proof or submission to the jury of any theory of recovery based on the disclosure of any trade secrets or confidential information. The trial court entered judgment against Petitioner alone providing that Ballard recover actual damages of \$674,873.02 and punitive damages of \$650,000 for a total of \$1,324,873.02. The opinion

of the Court of Civil Appeals generally correctly states the nature and result of this suit except in its references to the assumed secret or confidential nature of the disclosure to Petitioner by Respondent. Several undisputed facts essential to the proper determination of this case which have been omitted from the opinion are pointed out in the appropriate arguments.

For the convenience of the Court, copies of the opinion of the Court of Civil Appeals, judgment of the trial court (including the special issues and answers), Plaintiffs Second Amended Original Petition, and the agreements are included in a separately bound volume of appendices.

• • •

POINTS OF ERROR POINT OF ERROR NO. 1

The Court of Civil Appeals erred in holding that a confidential relationship existed as a matter of law because the holding was based on a new theory of recovery (trade secrets) which was not before the trial court and because there was legally insufficient evidence to support the holding. (Germane to assignments of error 1-5, 7, 8, 10, 12, 14, 15, 17-24, and 27 in Petitioner's motion for rehearing.)

POINT OF ERROR NO. 2

The Court of Civil Appeals erred in assuming that an invention is necessarily secret at all times and that the disclosure of an invention therefore creates a confidential relationship as a matter of law. (Germane to assignments of error 1-5, 7, 8, and 10 in Petitioner's motion for rehearing.)

• • •

POINT OF ERROR NO. 8

The Court of Civil Appeals erred in holding that federal patent law is not relevant in determining Ballard's right to a royalty on his invention under patent contract and confidential relationship theories because such holding has the effect of broadening Ballard's rights under his federal patent in violation of the Supremacy Clause of the U.S. Constitution. (Germane to assignments of error 46-53 in Petitioner's motion for rehearing.)

POINT OF ERROR NO. 9

The Court of Civil Appeals erred in holding that a confidential relationship existed as a matter of law between Ballard and Petitioner due to the existence of trade secrets because Ballard sought to protect his invention under the federal patent laws and any recovery based on trade secrets which is broader than the protection under his federal patent is preempted by federal law. (Germane to assignment of error 9 in Petitioner's motion for rehearing.)

APPENDIX S

S-1

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, January 5, 1977

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of

CRUTCHER-ROLFS-CUMMINGS, INC., vs. SAM L. BALLARD,
B-6299,

was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, *Clerk*

APPENDIX T

No. B-6299

IN THE
Supreme Court of Texas

CRUTCHER-ROLFS-CUMMINGS,

Petitioner,

v.

SAM L. BALLARD,

Respondent.

PETITIONER'S MOTION FOR REHEARING

A. H. EVANS
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January 19, 1977

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PRELIMINARY STATEMENT

There can be no breach of a "trade secret" confidential relationship after the "secret" is published

Punitive damages are not proper unless a tort has been committed which is separate and distinct from the contract sued upon

The judgment of the trial court may not be affirmed on a theory a recovery not before the trial court

GROUND OF ERROR

STATEMENT, ARGUMENT, AND AUTHORITIES

- A. The Court of Civil Appeals may not decide a case on a new theory of recovery
- B. The proper tests for awarding punitive damages have not been satisfied
- C. There can be no breach of a confidential relationship based on a secret invention as a matter of law where there was no breach before the invention was published in a patent
- D. Federal tests of patent infringement must be used in determining the obligation to pay royalties for the use of a patented invention
- E. Trade secret law which broadens the protection which an inventor secures under federal patent law is a violation of the Supremacy Clause of the U.S. Constitution

CONCLUSION AND PRAYER

CERTIFICATE OF SERVICE

• • •

T-1

PETITIONER'S MOTION FOR REHEARING

To THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Crutcher-Rolfs-Cummings, Inc. respectfully moves this Court to set aside its order entered on the 5th day of January, 1977 denying Petitioner's application for writ of error with the notation thereon "REFUSED. No REVERSIBLE ERROR." and to reconsider and grant Petitioner's application so that this Court may give full and complete consideration to the points of error raised and argued therein.

For the convenience of the Court, copies of the opinion of the Court of Civil Appeals, judgment of the trial court (including the special issues and answers), Plaintiff's Second Amended Original Petition, and the agreements are included in a separately bound volume of appendices attached to Petitioner's application for writ of error and cited as "Appx." herein.

• • •

GROUND OF ERROR

FIRST GROUND

This court erred in upholding the reversible error of the Court of Civil Appeals in holding that a confidential relationship existed as a matter of law because the holding was based on a new theory of recovery (trade secrets) which was not before the trial court and because there was legally insufficient evidence to support the holding.

SECOND GROUND

This court erred in upholding the reversible error of the Court of Civil Appeals in assuming that an invention is necessarily secret at all times and that the disclosure of an invention therefore creates a confidential relationship as a matter of law.

• • •

EIGHTH GROUND

This Court erred in upholding the reversible error of the Court of Civil Appeals in holding that federal patent law is not relevant in determining Ballard's right to a royalty on his invention under patent, contract and confidential relationship theories because such holding has the effect of broadening Ballard's rights under his federal patent in violation of the Supremacy Clause of The U.S. Constitution.

NINTH GROUND

This Court erred in upholding the reversible error of the Court of Civil Appeals in holding that a confidential relationship existed as a matter of law between Ballard and Petitioner due to the existence of trade secrets because Ballard sought to protect his invention under the federal patent laws and any recovery based on trade secrets which is broader than the protection under his federal patent is pre-empted by federal law.

• • •

APPENDIX U

U-1

CLERK'S OFFICE - SUPREME COURT

Austin, Texas,
February 23, 1977

Dear Sir:

You are hereby notified that the Motion for Rehearing
in the case of

CRUTCHER-ROLFS-CUMMINGS, INC., vs. SAM L. BALLARD,
B-6299,

was this day

OVERRULED.

Very truly yours,

GARSON R. JACKSON, *Clerk*

JUN 8 1977

MICHAEL ROBAK, JR., CLERK

No. 76-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CRUTCHER-ROLFS-CUMMINGS, INC.,

Petitioner,

v.

SAM L. BALLARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TEXAS COURT OF CIVIL APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT,
CORPUS CHRISTI, TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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No. 76-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CRUTCHER-ROLFS-CUMMINGS, INC.,

Petitioner,

v.

SAM L. BALLARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TEXAS COURT OF CIVIL APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT,
CORPUS CHRISTI, TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

**TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:**

Respondent, Sam L. Ballard opposes the granting of the Petition for Writ of Certiorari to review the judgment of the Texas Court of Civil Appeals, Thirteenth Supreme Judicial District (Corpus Christi) in this cause.

STATEMENT

Respondent brought this suit against Petitioner to recover for breach of a confidential relationship and for breach of contract. The jury returned a verdict in favor of Respondent. Judgment was entered that Respondent re-

cover actual damages of \$674,873.02 and punitive of \$650,000.00 for a total of \$1,324,873.02. The facts and the development of the case are fully set forth in the Opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas sitting at Corpus Christi (Appx. A-1 through A-17, inclusive). Petitioner's Application for Writ of Error to the Supreme Court of Texas was refused, no reversible error.

In 1949, Respondent approached the president and founder of Petitioner, Mr. A. S. Crutcher, to solicit assistance in developing a vertical pipe bending machine. Respondent demonstrated to Mr. Crutcher and several corporate officers a scale model of his machine. Respondent was immediately employed by Petitioner and a co-development agreement was reached. The letter reflecting the terms of the agreement was drawn and signed on November 8, 1949, by Respondent and A. S. Crutcher, for Petitioner (Appx. C-1).

Through the joint efforts of Petitioner and Respondent in March of 1950, Respondent filed a patent application in the United States Patent Office on the vertical pipe bending machine. Respondent used Petitioner's attorneys and the Petitioner bore the expense.

The vertical pipe bending machine resulted from the need which arose in the pipe line industry for a portable machine for use in the field on the pipe line right-of-way which would perform smooth cold bending of large diameter (12 to 36 inches) steel pipes (thirty to forty, sometimes eighty feet in length) of the types used in cross-country oil and gas pipe lines. The bend specifications for such pipes require that the bends be full, round, smooth and wrinkle free. The machine is operated by cables or hydraulics for

bending pipe in a vertical plane above the right-of-way, thus avoiding rough terrain or wooded areas on either side which could not be avoided by horizontal bending machines.

On November 3, 1950, the United States Patent Office declared an interference between the Ballard application on the vertical machine and the Coody application on a horizontal machine licensed to a company known as Cinch, Inc. By decision of the Board of Patent Interferences, Respondent was awarded priority of invention and Cinch filed suit against *Petitioner and Respondent* to set aside this decision. This litigation was ultimately settled by agreement in 1954, in which *Respondent and Petitioner* agreed not to sue Cinch for infringement in connection with hydraulic machines and Cinch agreed not to sue *Petitioner* for infringement in connection with cable machines.

On December 6, 1954, Respondent and Petitioner reconfirmed their agreement by executing a second written instrument (Appx. D).

By 1965, Cinch, Inc. or its successor was capturing the greater portion of the pipe bending machine market. In January, 1966, Petitioner purchased all of the issued and outstanding shares of its principal competitor and thereby acquired 82.04% of the outstanding shares of Crose United Corporation, successor to Cinch, Inc.

In February, 1966, Ernest E. Cummings, a director and vice-president of Petitioner was sent to Kerrville, Texas to persuade Respondent to sign a letter of agreement to the effect that Respondent would not be entitled to a royalty on the hydraulic bending machines manufactured, used or sold by Petitioner. Respondent was not persuaded and refused to sign the letter agreement.

In May of 1966 Petitioner transferred substantially all of the operating assets of Petitioner to Crose United Corporation. Also in May, 1966, the name of Crose United Corporation was changed by Petitioner to CRC Crose International, Inc. Thereafter, Petitioner knowingly failed to pay Respondent royalties on the hydraulic vertical pipe bending machines. Further, Petitioner instituted a scheme of corporations knowingly designed to remove the physical manufacturing, using, selling or renting of vertically operated hydraulic pipe bending machines from the corporate entity obligated to Respondent to a remote subsidiary in which Petitioner benefited through stock ownership. The development of the fraudulent scheme is illustrated by Exhibit A to this Brief.

The jury found, in part, that a confidential relationship existed between Respondent and Petitioner; that Petitioner breached the confidential relationship by failing to pay royalties on the net revenues resulting from the manufacture, use, sale and rental of vertical hydraulic pipe bending machines; that \$674,873.02 would compensate Respondent for the breach of confidence; that the then president of Petitioner (William Carey Crutcher, the son of founder, A. S. Crutcher) knew or should have known of the failure to pay such royalties; and Respondent should recover punitive damages of \$650,000.00.

Objection To Jurisdiction

The Court of Civil Appeals correctly held that the federal patent laws are not determinative of the rights of Respondent because the rights he sought to protect arise out of the confidential relationship and contract with Petitioner. The laws of the State of Texas protecting such rights are not inconsistent with the patent laws and therefore the

supremacy clause of the United States Constitution has no application.

This is not a suit for patent infringement. Except as Petitioner sought to introduce such spurious issues, the suit does not involve the validity or enforcement of any patent rights under the laws of the United States. This is not solely a "trade secrets" case. It is, further, a case of Petitioner's fraudulent conduct in seeking to exploit the total benefits of a confidential relationship between Petitioner and Respondent without accounting to Respondent.

Respondent was not a stranger simply licensing a patent to Petitioner. Respondent and Petitioner were co-developers, joint venturers, using the Respondent's know-how and principles in the development of vertical pipe bending machines and parts therefore. *Saco-Lowell Shops v. Reynolds*, 141 F.2d 587 (4th Cir. 1944).

To identify the subject matter of the confidential relationship, Petitioner and Respondent stipulated in the trial court that the vertical pipe bending machines were manufactured in accordance with specific drawings and that the accounting records of the child and grandchild subsidiaries of Petitioner attached to the stipulation established the amount of revenues produced by the machines illustrated in the drawings. From these drawings Respondent established the machines as the subject matter of the confidential relationship breached by Petitioner and the damages resulting therefrom.

The law is clear from *Saco-Lowell Shops v. Reynolds*, *supra*, at page 597:

• • •

"The liability of defendant here is not to be determined as upon a charge of patent infringement nor

even as in the case of an ordinary licensee under contract for the payment of royalties, for the reason that the J frames upon which royalties are claimed embody not only the fundamental ideas embodied in the Reynolds invention but also a specific application of those ideas evolved by Reynolds himself and communicated to defendant because of the confidential relationship into which the parties had entered for the development of the invention."

* * *

The law of the State of Texas governing confidential relationships, as they are defined in Special Issue No. 2, (Appx. J-3) to mean:

"... every form of relationship between parties wherein confidence and special trust is reposed by one in another and he is justified in placing such trust and confidence in such other party and relies upon such other party to protect his interest. This relationship is based upon fair dealing and good faith, rather than legal obligation. The term includes informal relationships such as moral, social, domestic, or merely personal ones, where one trusts in and relies upon another"

involves only the right of the State to govern particular business dealings and fraudulent conduct in such dealings.

Very basically stated:

"Fraud, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscious advantage is taken of another." *Black's Law Dictionary*, 4th Ed. at p. 789.

The Texas law applied by the Court of Civil Appeals in this case is supported in *Dupont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102, (1917):

"The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets he must take the burden with the good."

The scheme of corporate subsidiaries (see Exhibit A) used by Petitioner to commercially exploit the vertical pipe bending machines without accounting to Respondent was a breach of trust. Petitioner continued to assert the scheme as a bar to Respondent's claim. This breach of faith, justly reposed, was fraudulent conduct, clearly governed by independent state law, not dependent upon nor in contravention of federal patent law.

The only involvement of the Ballard patent in this cause was its use to define the subject matter and the duration of the confidential relationship and contract.

The question belatedly sought to be raised by Petitioner regarding the issuance of a patent being a "disclosure"

sufficient to defeat a confidential relationship is purely a question of state law as to a particular party such as Petitioner found to be in a confidential relationship with another such as Respondent.

The application for and the issuance of a patent under federal law may be used under state law as a factor in determining the existence of a confidential relationship but it is not determinative of the question. Further, the patent law was never intended to be a cover for fraudulent conduct so as to allow a party such as Petitioner to avoid the basic obligation of good faith in a relationship of special trust.

If it is assumed that Petitioner properly raised any federal question, nevertheless the judgment of the Texas Court of Civil Appeals is based on adequate and independent state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

The only questions presented to and decided by the Texas Court of Civil Appeals were questions involving the application of long established equitable principles of state law to the facts of this case. The judgment and opinion is grounded entirely on state law. No federal questions were decided in the Court's opinion. The Supreme Court of Texas refused the Writ of Error, no reversible error, without expressing any basis for its decision. (Appx. 5-1)

There were no federal questions embraced within the scope of or subsidiary to the courts' decisions on the questions discussed in detail and decided in the Opinion of the Court of Civil Appeals. (Appx. A)

Reasons For Not Granting the Writ

In this breach of confidential relationship and contract case there are no special or important reasons for granting the Writ of Certiorari, *Supreme Court Rule 19*. No consti-

tutional questions are involved. No important policy issues are presented concerning the balance between the state and federal judicial systems, the relations of the branches of the federal government of the fundamental rights of the individual in relation to government. While this case is important to the parties, it does not involve any principles the settlement of which are of special significance to the public.

There is no conflict in the judgment and decision of the state court in the application of the laws of confidential relations and contracts under the facts in this case and the cases heretofore decided by this Court from *E. I. DuPont de Nemours Power Co. v. Masland*, *supra*, through *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). The Texas Court of Civil Appeals in its decision has effectively followed the principles of law enunciated in those cases. There have been numerous decisions of inferior federal courts which have likewise followed the holdings of this Court in these cited cases. For example, *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 161 (2nd Cir. 1946) dealt with the New York state law of unjust enrichment as applied to facts very similar to those we have here.

While the state court has not decided a substantial federal question, it is respectfully submitted that if it has then its decision is in accord with applicable decisions of this Court and a majority of other courts that have handed down decisions and written on the subject. The courts do not allow the technical aspects of corporate, real estate or patent law to shield fraudulent conduct.

The Texas Court of Civil Appeals followed the principles of *Hyde Corporation v. Huffines*, 314 S.W. 2d 763 (Tex. 1958) cert. denied, 1958, 358 U.S. 898 and *K & G Oil Tool & Service Co. v. G & G Fishing Tool Service*, 314 S.W.2d

782 (Tex. 1958) cert. denied 1958, 358 U.S. 898, regarding the peculiar and distinct obligations of a party in a relationship of special trust. These principles are consistent with other jurisdictions requiring such utmost good faith from one in a relationship of special trust as to distinguish them from the public at large. *Smith v. Dravo Corporation*, 203 F.2d 369 (7th Cir. 1953), (which applied in a diversity of citizenship case, the law of Illinois and the law of Pennsylvania under the Illinois doctrine of conflict of laws); *Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104, (7th Cir. 1936); *Franke v. Wiltsechek*, 209 F.2d 493, (2nd Cir. 1953) (which applied in a diversity of citizenship case, the law of New York).

The Petitioner has misdescribed the decision of the Court of Civil Appeals, but in any event, it has shown no conflict between Texas law and federal law. The Petitioner's statement of the law of the State of Texas at page 8 of its Petition that:

" . . . Texas trade secret law as applied in this case to a patented invention would obligate Petitioner to not use or disclose the Ballard invention to others, even after a patent on the invention issued"

is simply false.

The Petitioner *has* used the invention and the protection of the Ballard patent, but it cannot have done so without accounting to Respondent as a result of the relationship of confidence and special trust. There was a disclosure to the public *but* Petitioner is not the public under the facts in this case but a fiduciary guilty of fraudulent conduct.

CONCLUSION AND PRAYER

No federal questions have been timely raised or decided in the Texas Court of Civil Appeals; the judgment of the state court below is based on adequate state grounds independent of any federal question; and the judgment and decision of the Texas Court of Civil Appeals is correct. There are no issues of national economic importance in this case. Requiring fiduciaries to abstain from fraudulent conduct or respond in damages will not vary the scope of patent protection in different states nor frustrate the purposes and objectives of federal law. We, therefore, respectfully pray that the Petition for Writ of Certiorari to the Texas Court of Civil Appeals be denied.

Respectfully submitted,

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and

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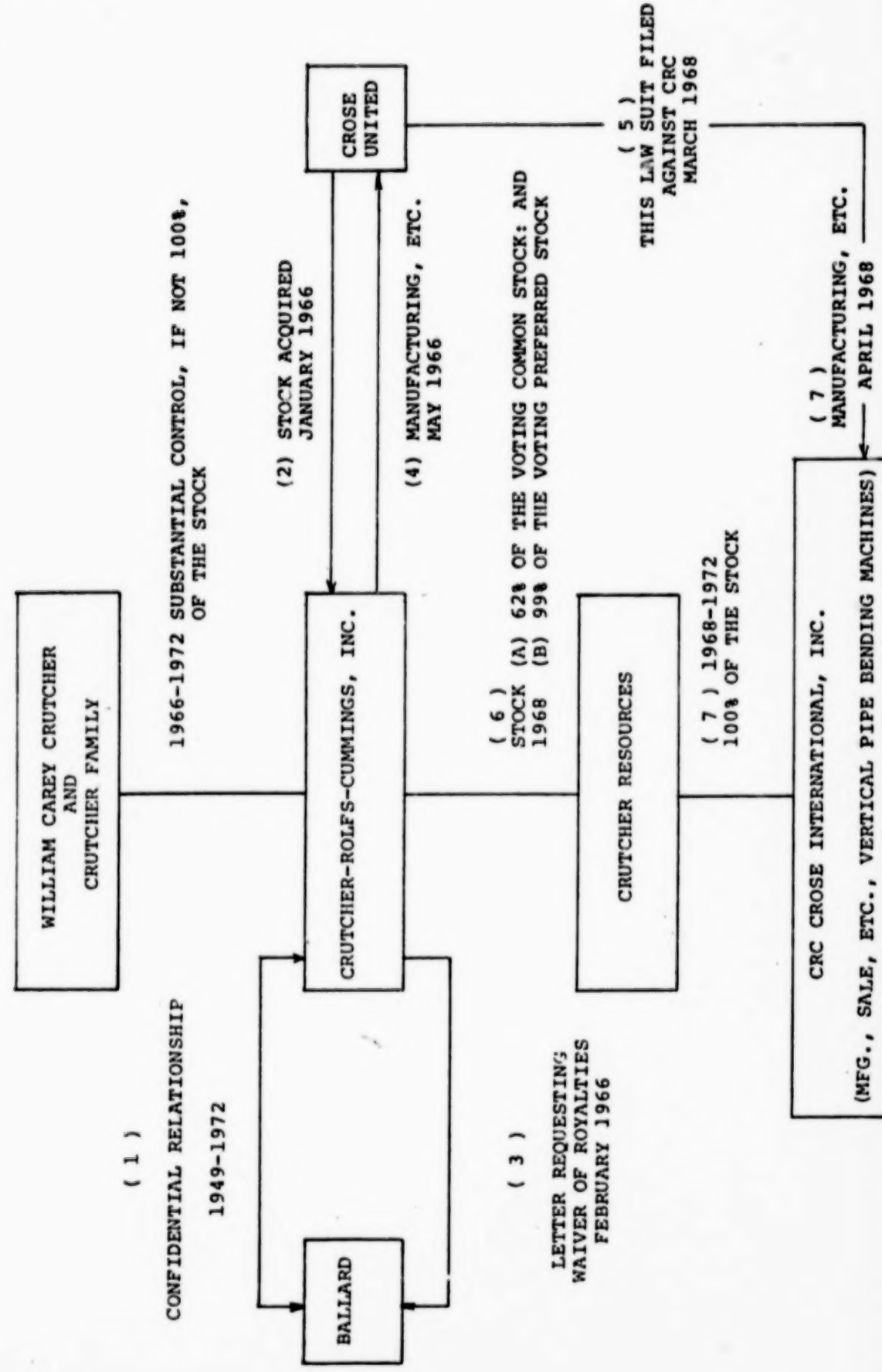
by

Attorneys for Respondent
Sam L. Ballard

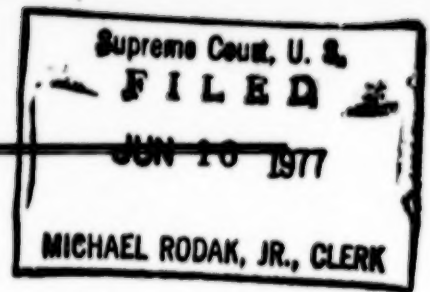
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been served on defendant-petitioner by delivering three copies to its attorney of record, A. H. Evans, 1835 First City National Bank Bldg., Houston, Texas 77002, this day of June, 1977.

EXHIBIT A



No. 76-1619



IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CRUTCHER-ROLFS-CUMMINGS, INC.

Petitioner

v.

SAM L. BALLARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CIVIL APPEALS,
THIRTEENTH JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

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No. 76-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CRUTCHER-ROLFS-CUMMINGS, INC.

Petitioner

v.

SAM L. BALLARD

Respondent

To the Honorable Supreme Court of The United States:

Petitioner respectfully submits this brief in reply to arguments first raised in Respondent's Brief in Opposition.

JURISDICTION

Respondent contests the jurisdiction of this Court on the basis that the law of confidential relationship based on trade secrets is purely a question within the province of state law so that the supremacy clause of the United States Constitution has no application. However, this Court has recognized in recent years that state law dealing with unfair competition and trade secrets which tends to frustrate the purposes and objectives of federal patent law favoring publication of inventions and limited monopolies are in violation of the supremacy clause, thereby vesting jurisdiction in this Court. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969);

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225(1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). Respondent has not cited a single case post-dating these preemption cases in support of his position on jurisdiction. The conflict between Texas law and federal patent law forming the basis for jurisdiction of this Court emerged in this case when the Texas courts (1) gave trade secret protection to an invention after the invention was published in an issued United States patent; and (2) failed to apply established federal standards in determining the scope of a United States patent, admitted by Respondent to be the subject matter of the confidential relationship, in stating "The technicalities of federal patent laws are not determinative of Ballard's rights under the subject contract and confidential relationship." (Appx. A-16).

FEDERAL PATENT LAW MUST BE APPLIED IN DETERMINING THE SCOPE OF A CONFIDENTIAL RELATIONSHIP, THE SUBJECT MATTER OF WHICH IS DEFINED BY A U.S. PATENT

Respondent recognizes the critical fact that

"The only involvement of the Ballard patent in this cause was its use to define the subject matter and duration of the confidential relationship and contract."
(Respondent's Brief, p. 7)

Since the Ballard patent defined the subject matter of the confidential relationship, the state courts should have considered the federal tests for determining the proper scope of a federal patent, as well as the legislative purposes and objectives of federal patent law, to insure that Respondent's rights under his patent are dictated by federal patent law, rather than by preempted state law. The Court of Civil Appeals expressly denied that federal patent laws are relevant to the issues in this case (Appx. A-16), thereby erroneously enlarging Respondent's rights in his patent under the guise of state confidential relationship law.

Respondent cites *Saco-Lowell Shops v. Reynolds*, 141 F.2d 587(4th Cir. 1944), *Shellmar Products Co. v. Allen-Qualley Co.*, 87 F.2d 104(7th Cir. 1936), *Smith v. Dravo Corp.*, 203 F.2d 369 (7th Cir. 1973), and *Franke v. Wilt-schek*, 209 F.2d 493(2nd Cir. 1953) in support of his position that state law on the issue of confidential relationship does not conflict with federal law. Each of these cases is easily distinguishable from the facts of this case in that (1) each case involved the breach of a confidential relationship based on trade secrets which occurred *prior* to publication of the secret, whereas in this case the alleged breach first occurred long *after* the invention was published in an issued patent; and (2) each case predates the recent decisions of this Court applying the doctrine of preemption in cases involving a conflict or potential conflict between state trade secret and unfair competition law on one hand and federal patent law on the other hand.

There is no authority whatsoever to support Respondent's position that a state may ignore federal patent law where, as Respondent himself characterizes it, a federal patent is used to define the subject matter and duration of the confidential relationship.

FRAUD

Respondent uses charges of fraud and fraudulent scheme as the foundation for the arguments set forth in his brief. There is absolutely no basis for these charges. There was no finding by the jury, trial court, or court of civil appeals that Petitioner was guilty of any fraud. The imaginary charge of fraud made by Respondent is an ill-conceived subterfuge designed to divert the Court's attention from the serious and important issues of federal preemption raised by the Petition.

CONCLUSION

Petitioner respectfully submits that the conflict between state law concerning trade secrets and federal patent law

highlighted in this case merits resolution by this Court. In this era of technology of ever increasing complexity and importance, it is imperative that those dealing in new technology do so with the certain knowledge that once a United States patent issues, then state laws of trade secrets are preempted to the extent that they are in conflict with the federal patent law and, therefore, the scope or extent of that which may be protected thereafter is governed solely by federal patent law. Otherwise, state trade secret laws make a mockery of the federal patent laws and serve no purpose other than to trap the unwary who look to the patent laws to determine their rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION has been served on plaintiff-respondent by delivering three copies to his attorney of record, Jack W. Hayden, Suite 1270 Park Tower South, 1333 West Loop South, Houston, Texas 77027, this 15th day of June, 1977.

A. H. Evans